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Indiana Law Review



Volume 36 No. 4 2003

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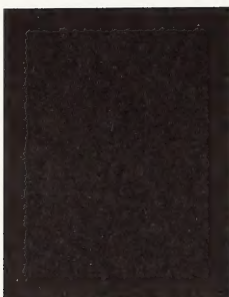
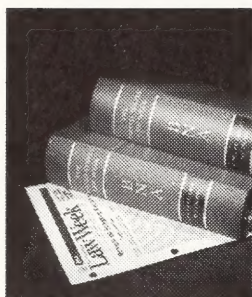
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Volume 36

2002-2003



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(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Subscriptions. Current subscription rates for an academic year are \$30.00 (domestic mailing) and \$35.00 (foreign mailing) for four issues. Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. *Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.*

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POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.



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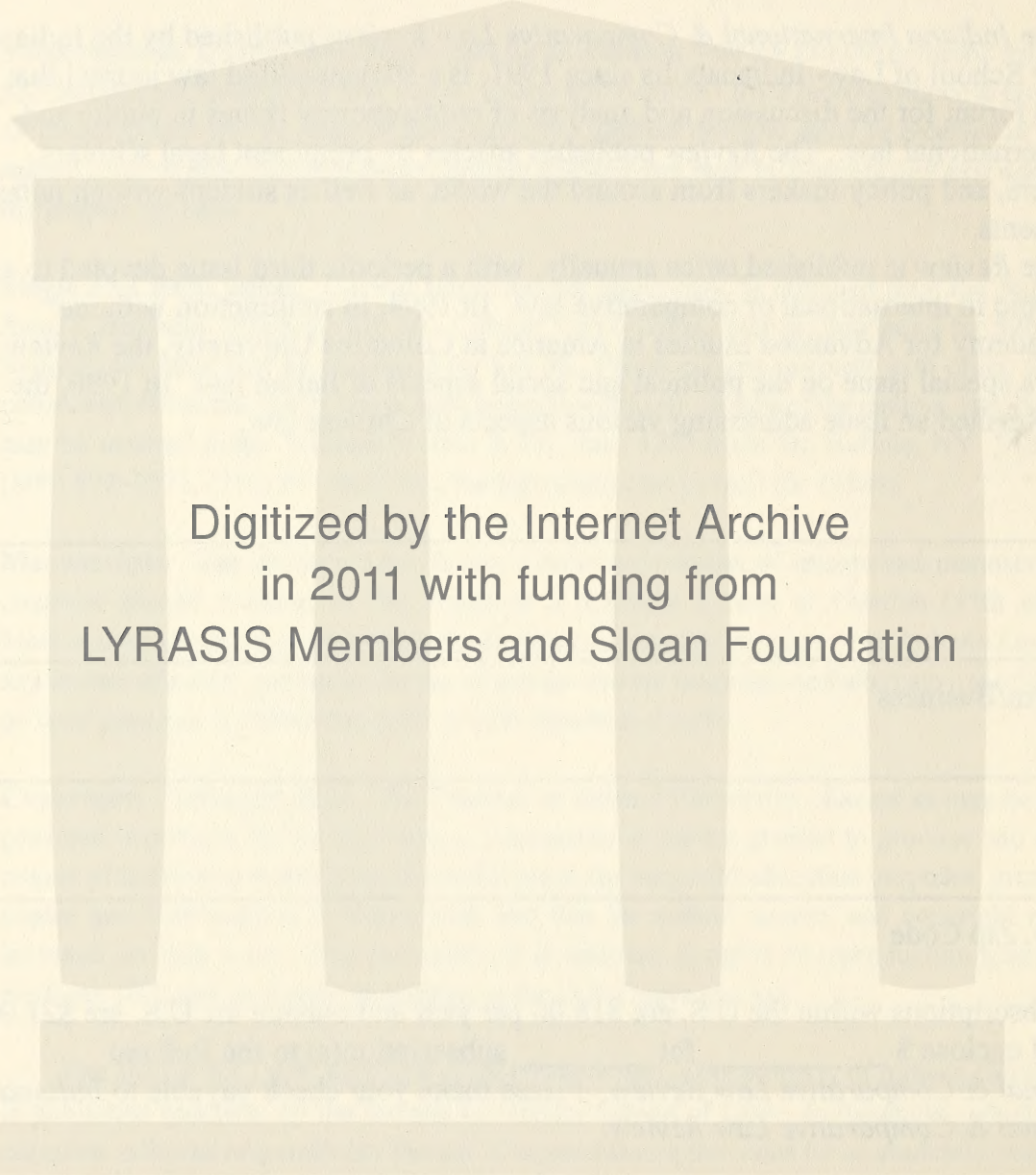
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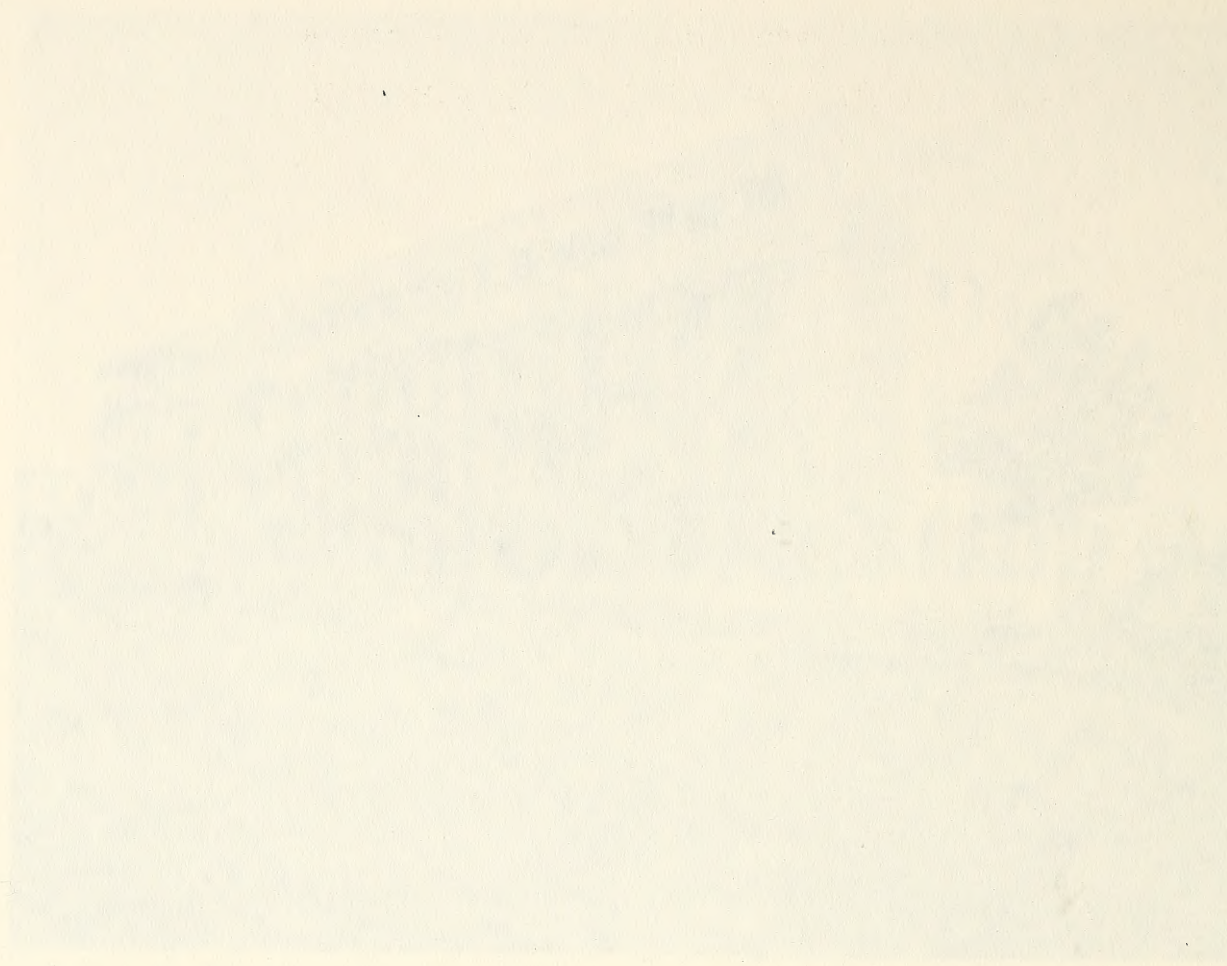
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WHY THE COURTS MATTER IN BUILDING A STRONG ECONOMY

RANDALL T. SHEPARD*

It has been a year when policymakers and public alike have focused on an important question about Indiana's future: how can Indiana organize itself so that we will not be so vulnerable to shifts in the national economy?

Dealing with this challenge is mainly a job for legislators and the governor and other executive officers, but the state's judiciary and the legal profession must also act to make Indiana stronger and smarter in the world of tomorrow than we are today. Those who lead our state have understandably focused on: (1) how to sustain progress in education, (2) how to assist families threatened by the economic downturn, and (3) how to build a better workforce and a more diverse economy. Though we rarely express it in just this way, this is part of the judiciary's work, too.

I. IMPROVING PUBLIC EDUCATION

To survive in a changing environment, Indiana needs the best-educated citizens Indiana can have. Toward that end, building better schools and colleges and sustaining them during lean years have been close to the top of the public agenda. In the last year, we in the judiciary have been doing more than ever before to provide education in a field where we have a unique capacity to contribute: civic education.

We have deployed one of the historic features of appellate courts—public hearings—as a tool for educating both students and adults. We now broadcast live over the Internet every hearing of the Supreme Court and selected hearings of the Court of Appeals and Tax Court. Our central goal is to make high school and college students better-educated citizens. It is quite obviously a useful resource for law students and faculty as well. We have broadcast more than fifty proceedings, created lesson plans for highlighted cases, and met with hundreds of government and social studies teachers to explain this new resource. Demand by schools and others is so strong that these hearings represent well over half of state government's most frequently demanded videos. We expect that during 2003 people will tap this resource 60,000 times.¹

The lessons from these broadcasts are only incidentally lessons about appellate courts.² They teach people about law and society: what should the law

* Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia.

1. Elizabeth Osborn of the Indiana Supreme Court's staff has taken the lead in this effort. She is Assistant to the Chief Justice for Court History and Public Education.

2. See, e.g., Jeff Goodell, *The Supreme Court*, WIRED, Mar. 3, 1995:

But the real power of Court TV is more than just good journalism, more than just interpretation or analysis. You get hooked on Court TV because of the purity of the medium. The bad lighting, the bad sound. The slow pan and focus of the single camera; no obnoxious cutting, no two-shots. You have to concentrate, you have to look. And the closer you look, the more nuance is revealed. The nervous tick of a defense

of search and seizures be during a war on terrorism, does your insurance policy cover you when you drive a car you borrowed from a friend, who is responsible if you get sick from exposure to asbestos?

Our colleagues in the practicing bar have taken these same lessons live into Indiana classrooms. Last fall the Indiana State Bar Association sent 450 lawyers to more than 500 schools for presentations on the Bill of Rights.³

We likewise are working to help educate the growing number of Hoosiers for whom English is not the first language. We provide a growing body of information about the legal system and a good many basic court documents in Spanish, through our Self-Service Legal Center. The Supreme Court has approved a proposal by our Commission on Race and Gender Fairness for a major initiative in providing translation, focusing first on people who speak Spanish.⁴ Even in dark economic times, the legislature has been willing to find new money to support this effort.

Indiana must not be a place where people get lost in the legal system just because they have not yet mastered English.

II. COURTS AND FAMILIES

We pay special heed to the strength of families during hard times because we believe that strong family units both make for better educated children and sustain a more effective workforce. Many of the social problems that have plagued American society are caused by the breakdown of families.⁵ According to criminologists, social scientists, and other observers, evidence suggests that such breakdown is the real root cause of crime in America.⁶ It is a widely

witness. The finger-tapping judge. Nothing escapes notice. In the courtroom, the camera becomes the unblinking eye of God.

3. Stephen M. Terrell, *What's Great About America? "We Stick Together,"* RES GESTAE, Oct. 2002, at 8. During the Indiana State Bar Association's "Ask me what's great about America", whereby attorneys spoke to schoolchildren across the state to discuss "the Bill of Rights and other freedoms that make America great." *Id.* "What greater way to ensure the continuation of freedom and strike a blow against those who wish to destroy this nation, than by spending time with our young people, passing on lessons of freedom to yet another generation." *Id.* at 9.

4. The Indiana Supreme Court Commission on Race and Gender Fairness recommended that the court participate in an interpreter consortium through the National Center for State Courts to implement an interpreter testing system for Spanish. See Executive Report and Recommendations of the Indiana Supreme Court Commission on Race and Gender Fairness, App. at E (Dec. 20, 2002).

5. "Any family form that differs from the traditional two-parent, biological family is assumed to place children at risk." See Amy Lofquist, *The Effects of Remarriage on Children*, at <http://nips.med-web.com/Handouts/Individual%20Pages/REMARRIAGE.htm>. In 1996, the number of children being raised in single-parent families rose to about eighteen million. See Dr. Tom O'Connor, Justice Studies Department at North Carolina Wesleyan College, *MegaLinks in Criminal Justice*, at <http://faculty.ncwc.edu/toconnor/juvjusp.htm#CAUSAL>.

6. See Patrick F. Fagan, *The Real Root Cause of Violent Crime: The Breakdown of the*

accepted premise that children born into single-parent families are much more likely to fall into poverty and welfare dependency than children born into intact families.⁷ Such children are also more likely to fall behind in school and experience emotional problems.⁸

Furthermore, statistical data supports the notion that married couple households yield a higher percentage of employment than single parent family households.⁹ In Indiana, 6.7% of all families are below the poverty level. Among female households where no husband is present, however, the poverty rate is more than three times higher, 23.4%.¹⁰ For this reason, supporting strong

Family, at <http://www.libertyhaven.com/politicsandcurrentevents/crimeandterrorism/realroot.shtml>. “A major 1988 study of 11,000 individuals found that ‘the percentage of single-parent households with children between the ages of 12 and 20 is significantly associated with rates of violent crime and burglary.’” *Id.* The same study makes it clear that the key factor explaining the incidence of crime is the absence of marriage and the failure to form and maintain intact families. *Id.*

7. *Id.*

8. See Kathleen Sylvester and Kathy Reich, *Restoring Fathers to Families and Communities: Six Steps for Policymakers*, at <http://npin.org/library/2002/n00621/n00621text.html>.

9. Statistical data from the U.S. Census Bureau denote the percentage of families in the labor force.

Title	Number	Percentage
I. Married Couple	1,272,826	
• Husband in labor force	989,222	
• Wife in labor force	710,422	71.8 %
• Wife not in labor force	278,800	28.2 %
• Husband not in labor force	283,604	
• Wife in labor force	78,773	27.8 %
• Wife not in labor force	204,831	72.2 %
II. Other Family	338,219	
• Male household, no wife	88,995	
• in labor force	71,012	79.8 %
• not in labor force	17,983	20.2 %
• Female household, no husband	249,224	
• in labor force	176,972	71.0 %
• not in labor force	72,252	29.0%

10. Statistics on families below the poverty line.

• Families below the poverty line	107,789	
• with related children under 18	84,392	78.3 %
• Families with female household, no husband present	58,402	
• with related children under 18	53,075	90.9 %

families is a central mission of the Indiana judiciary.

Last year we made major changes in our approach to family cases. The Superior Court in Lake County, for example, created a consolidated domestic relations division to deal more effectively with problems like custody, parenting time, and child support. To relieve the trauma children often experience in domestic litigation, the Lake Circuit Court created a children's room, a special haven in a difficult environment.¹¹

Our statewide family court initiative seeks to develop a coordinated approach to dysfunctional families who frequently bounce around from one courtroom to the next. (In Porter County we found one group of 115 families who had generated 443 different cases.) We are now providing direct support to reform projects in five new counties, and a good many more are using some of the techniques we are developing.

And as we closed the year, families in Lake County had the advantage of a state-of-the-art facility for juvenile court and social services and residential care, created through the leadership of Judge Mary Beth Bonaventura. And a similar testimonial to the importance of families is now under construction in Fort Wayne by virtue of the leadership of Judge Steven Sims and Allen County government.

From family courts, to new facilities, to reforms in procedure, building stronger families for Indiana's future is never very far from the hearts of Indiana judges.

III. STRONGER WORKFORCE, STRONGER ECONOMY

Strategic decisions about rebuilding Indiana's economy are rightly in the hands of legislators and executive leaders, but effective courts play an important supporting role.

Indeed, the very creation of the first civil courts early in the last millennium was driven by the desire to build commerce, and protect economic trade and self interests. For example, if merchants in Rome wanted to trade with makers of goods in Nice, they needed common rules about enforcing contracts and they needed reliable courts where they could seek relief if they did not get paid.

The legal profession itself emerged during the reign of Edward I (1272-1307),¹² as a necessary predicate to better protect economic trade and further economic self-interest. Creating a law for merchants was necessary since traders from diverse cultures and backgrounds were exchanging goods and no technical jurisprudence was suitable to govern them collectively.¹³

Likewise, the custom of merchants in England, the predecessor to our current

11. See Mark Kiesling, *Court Makes Room for Children*, THE TIMES (Northwest Indiana), Aug. 21, 2002, at B1.

12. Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 7-8 (1998) (discussing the emergence of the legal profession).

13. 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 543 (7th ed. 1956).

judicial system, was recognized as a law apart from the common law.¹⁴ The relation between the laws, however, was close.¹⁵ As commerce continued to increase during the eleventh and twelfth centuries, and as the rise of great commercial cities continued to flourish, the law of merchants received great momentum.¹⁶ With better organization and foreign trade and as the collection of customs became more convenient, "special courts provided for merchants who resorted thither."¹⁷

As Jonathan Rose has observed, "These substantive and thematic aspects are not merely interesting from a historical perspective."¹⁸ They serve as the antecedent to modern jurisprudence.¹⁹

Law and lawyering are still crucial to a healthy economic environment. Toyota recently announced several hundred jobs at Princeton, Indiana, and that could not happen unless you could with confidence manufacture cars, ship them elsewhere, and know you would get paid by the buyers and that there would be recourse to effective courts if you did not.

Much of what we do by way of refashioning Indiana's judicial system helps improve the state's economic environment. Let me cite a few examples:

- At the beginning of 2003, a new set of rules took effect reforming Indiana's jury system in ways that will make our juries more representative, make it easier for jurors to serve, and reduce the economic costs associated with mistrials.²⁰
- The Supreme Court's decision to take more cases on civil law will provide greater certainty in fields like finance and insurance and contribute to economic development. Last year we decided more civil cases than in any year in the Supreme Court's history.²¹
- The monumental effort led by Justice Sullivan to create a computerized statewide case management system will among other things help reduce the cost of litigation, because cases will move through the system more quickly and people will have easy access to information.
- Our emphasis on mediation as an alternative to litigation, including brand new rules supporting the role of mediators, makes it cheaper and faster and simpler for people who have a dispute to get it resolved.²²

14. *Id.* at 539.

15. *Id.*

16. *Id.* at 528.

17. *Id.* at 542.

18. Rose, *supra* note 12, at 85.

19. *Id.*

20. See Ind. Jury Rules 1-30 (adopted Dec. 21, 2001, effective Jan. 1, 2003, including amendments received through Oct. 1, 2002).

21. See Ind. Supreme Court Annual Report, July 1, 2001, to June 30, 2002, at App. A (providing a case disposition summary and case inventories).

22. See Ind. Alternative Dispute Resolution Rules 8.1-8.8 (amended July 19, 2002, effective

- And judges in criminal courts are devising new techniques that will make for a better workforce. I recently visited a drug court graduation in Evansville, presided over by Judge Wayne Trockman. There were five graduates, all people who had pleaded guilty to non-violent class D felonies, people who had survived eighteen months of a rigorous discipline and whom the court and the prosecutor were satisfied had entered into serious recovery. Every one of them had an actual job, going to work and paying taxes (and not taking up a bed at the Department of Correction).
- Finally, Indiana courts and courts across the country continue to formulate specialized court systems to increase case management and reallocate case loads. The tax court, for example, provides direction on tax matters to create uniform guidelines and structure. Other states have implemented business courts to “promote efficient resolution of all cases.”²³ Eighteen states have or are presently considering whether to establish a business court.²⁴ The notion is that assignment of cases to judges with particular interests and expertise “enhance consistency, predictability, and accuracy of decisions” on legal issues.²⁵

CONCLUSION

Most of the time, we lawyers are so caught up in handling the many cases that come our way that we do not have the time to contemplate the collective effects our work can have on the vitality of the society we serve. It is fairly easy, however, to name states where some dysfunction in the court system has become a millstone around the state’s economic future. We are determined that that will not happen in Indiana.

Jan. 1, 2003).

23. State Bar of Michigan Business Law Section, Business Court Ad Hoc Committee (June 2002), at <http://www.bodmanlongley.com/a-110802a.htm> (listing general facts about business courts).

24. *Id.*

25. *Id.*

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2002*

KEVIN W. BETZ**
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The constitutional change that occurred in 2001 in the court's jurisdiction over mandatory criminal appeals fulfilled its purpose in 2002. It was expected that this change would open the court to "people with ordinary family and business legal problems" and allow the court to take a more significant role in providing law-giving criminal opinions.¹ For the first time in six years, mandatory criminal appeals did not constitute the majority of the court's docket.² The court's docket was freed to consider more family and business legal

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard; but, of course, any errors or omissions belong to his former law clerk. We also thank WESTLAW® for its kind willingness to allow us free access to its computer resources and assistance in preparing these Tables.

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1. Randall T. Shepard, *Why Changing the Supreme Court's Mandatory Jurisdiction Is Critical to Lawyers and Clients*, 33 IND. L. REV. 1101, 1104 (2001).

2.

	MANDATORY	DISCRETIONARY	TOTAL
1991	109 (53%)	98 (47%)	207
1992	64 (41%)	93 (59%)	157
1993	60 (44%)	77 (56%)	137
1994	60 (45%)	73 (55%)	133
1995	46 (38%)	76 (62%)	122
1996	68 (59%)	48 (41%)	116
1997	100 (58%)	71 (42%)	171
1998	84 (63%)	50 (37%)	134
1999	101 (59%)	69 (41%)	170
2000	132 (69%)	60 (31%)	192
2001	97 (62%)	59 (38%)	156
2002	76 (45%)	92 (55%)	168

problems in 2002. Generally, the number of civil appeals granted transfer increased to 53 in 2002. In 2001 and 2000, only 34 and 43 civil appeals were granted transfer, respectively. In fact, the court decided a record number of divorce, child support, and paternity actions in 2002.

The court adopted new procedures in 2002 likely intended to help open the court to "people with ordinary family and business legal problems."³ First, the court began scheduling oral arguments in all civil cases granted transfer in 2002.⁴ This signals a new focus on civil issues that previously were crowded-out of the court's docket by the large number of mandatory appeals. Civil appeals granted transfer by the court generally involve novel and/or significant questions of law. The court has also adopted the use of published orders to correct lower courts' decisions without a full opinion. The court issued a published order reversing the court of appeals' decision upholding a criminal sentence noting that decision was inconsistent with prior jurisprudence.⁵ Similarly, in *Fight v. State*,⁶ the court issued an order reversing a court of appeals opinion for upholding a sentence that was inconsistent with the statutory limitation on consecutive sentences.⁷ Finally, the court issued an order reversing the court of appeals decision in *Oxley v. Matillo*,⁸ based on the court's decision in *Ray-Hayes v. Heinemann*.⁹ The use of orders allows the court to correct legal errors made by lower courts without the necessity of the attention required of a full opinion thereby reserving more time to focus on cases with novel and/or significant legal questions.

The trend identified in last year's Article toward less consensus among the justices continued this year. Although the percentage of unanimous decisions was higher than in 2001, the number of justices dissenting from the majority position increased to 23.3% of all decisions. The number of split (3-2) decisions by the court remained at the high levels experienced in 2001. The court issued only 9 split decisions in 1999, 15 split decisions in 2000, but 26 split decisions in 2002 and 27 split decisions in 2001.

The following is a description of the highlights from each table.

Table A. In 2002, the supreme court issued 165 opinions that were authored by an individual justice. This is a sharp decrease from previous years. In 2001, the court issued 187 opinions authored by an individual justice and in 2000 it issued 192 opinions. Those who predicted the change in the court's mandatory jurisdiction over criminal appeals would allow more civil cases to be heard by

3. See *supra* note 1.

4. George T. Patton, Jr., *Appellate Civil Case Law Update*, RES GESTAE, Nov. 2002, at 19.

5. *Hancock v. State*, 768 N.E.2d 880 (Ind. 2002).

6. 768 N.E.2d 881 (Ind. 2002).

7. The court of appeals decided that the limitation on consecutive sentences did not apply because the defendant's crime resulted in "serious bodily injury," relying on *Greer v. State*, 684 N.E.2d 1140 (1997). The court, however, reversed, noting that the "serious bodily injury" language was repealed and replaced with a statutory list which did not include the defendant's crime.

8. 747 N.E.2d 1179 (Ind. Ct. App. 2001).

9. 760 N.E.2d 172 (Ind. 2002).

the court were vindicated in 2002. Of the 165 opinions issued in 2002, 31.6% (60) were civil opinions. This is an increase from 2001 when only 23% (49) of the opinions issued by individual justices were civil cases. Opinions resolving direct criminal appeals initiated before the Indiana Constitution was amended (to require direct appeals only in death penalty cases) tapered to a trickle by the last quarter of 2002. Next year will be the first full year reflecting the full impact of the amendment to the Indiana Constitution.

Chief Justice Shepard, issuing 42 opinions, authored the most opinions, beating out even Justice Boehm (authoring 36 opinions) who has held this distinction for the 3 previous years. The court as a whole issued 25 per curiam opinions—24 civil and 1 criminal. Almost all 24 civil opinions were attorney discipline matters. This is about the same as the 23 civil per curiam opinions decided in 2001.

Continuing the trend of increases in dissents identified by this Article in 2001, the court again increased its dissents to 61. For comparison purposes, the court issued 56 dissents in 2001, 42 dissents in 2000 and 38 dissents in 1999. Justice Sullivan returned as the justice with the greatest number of dissents, drafting 16 dissents. Justice Sullivan had the least total dissents in 2001 but led the court with the highest number of dissents in 2000, 1999, 1998 and 1997.

Table B-1. For 2002, the authors of this Article opted to amend this table. In previous years, attorney discipline cases were not counted. As a result of the court's shift to resolve more attorney discipline cases by orders, the attorney discipline cases the court is resolving in opinions tend to involve more significant and/or controversial decisions that provide significant insight into the agreement of the justices. For this reason, Table B-1 now incorporates all attorney discipline cases not resolved by order.

For civil cases, Justices Shepard and Sullivan were the two justices most aligned at 85.4%. Justices Shepard and Boehm were next at 82.5%. Justices Dickson and Boehm were the least aligned at 67.5%. Chief Justice Shepard was the most aligned with other justices, and Justice Dickson was the least aligned.

Table B-2. For criminal cases, Chief Justice Shepard and Justice Sullivan are the most aligned pair of justices—in agreement 92.1% of the time. Justices Sullivan and Dickson were the least aligned at 78.4%. As for criminal cases, Justice Shepard was the most aligned with his fellow justices.

Table B-3. For all cases, Chief Justice Shepard and Justice Sullivan were the two justices most aligned at 90.5%. The two least aligned justices, the same as last year, were Justices Sullivan and Dickson at 76.1%.

Overall, Chief Justice Shepard was the most aligned with his fellow justices, and Justice Dickson was the least aligned.

Table C. The court's unanimity increased from 69.1% in 2001 to 74.2% in 2002. The percentage of unanimous cases in 2002 compares similarly with that of 2000 and 1999 (81.3% and 72.8%, respectively). However, the percentage of dissents increased substantially again in 2002 to 23.2%. The percentage of

dissents in 2001 was 18.5%. Cases decided in 2000 and 1999 drew dissents in only 12.4% of the decisions. This continues to suggest that as the justices are freed from mandatory criminal appeals (which often involve similar questions that have previously been decided by the court) they are facing issues involving more controversy and novel questions in Indiana law.

Table D. Table D, more than any other table, again demonstrates the increased divisions among the justices. The number of 3-2 split decisions remained at the high level experienced in 2001. This year, the court issued 26 split decisions. Last year there were 27 split decisions. By comparison, the court issued only 15 and 9 split decisions in 2000 and 1999, respectively. Chief Justice Shepard was in the majority in the most number of split opinions. He was in the majority in 19 of the 26 split opinions.

Table E-1. The court accepted substantially more civil appeals for review in 2002. In 2001, 34 civil appeals were granted transfer. In 2002, 53 civil appeals were granted transfer. Similarly, more non-mandatory criminal appeals were granted this year—39 verses 25 in 2001. The statistics in Table E-1 vindicate the change in the court's jurisdiction over direct criminal appeals. At least one purpose of a "court of last resort" is to ensure that the important legal issues confronted by litigants are correctly resolved by lower courts. The court's authority to determine whether to accept non-mandatory appeals helps promote this goal. For example, non-mandatory civil appeals were reversed 86.7% and non-mandatory criminal appeals were reversed 74.4% of the time in 2002. In marked contrast, direct criminal appeals were reversed only 30% of the time in 2002. The change in the court's mandatory jurisdiction over direct criminal appeals (now limited only to cases where the sentence is death) is reducing the number of mandatory appeals, therefore, freeing the court's docket to address cases requiring the court's guidance. For the first time in many years, mandatory criminal appeals did not constitute more than half of the court's docket.

Overall, the court affirmed cases 40.4% of the time. This high percentage was driven by the large percentage of mandatory criminal appeals affirmed. In contrast, civil appeals were affirmed only 13.3% of the time and nonmandatory criminal appeals were affirmed only 25.6% of the time. The percentage of cases affirmed by the court declined this year from 2001 where the court affirmed 55.8% of the time. This is directly attributable to the decrease in mandatory criminal appeals on the court's docket.

Table E-2. Expectations were high that the change in the court's mandatory jurisdiction would lead to an increase in the number of civil petitions granted transfer. Those expectations were borne out this year. The number of civil petitions granted transfer by the court increased to 59 in 2002, as compared to 34 in 2001. However, this increase should be kept in perspective. In 2000, 61 cases were accepted for transfer. A civil petition to transfer stood about a 23.4% chance of being granted, and a criminal petition stood about a 23% chance of being granted. Juvenile petitions to transfer stood a 7.4% chance of being granted.

Table F. Table F demonstrates that the change in the court's mandatory jurisdiction over direct criminal appeals has opened the doors to a wider variety of civil actions being brought before the court. This is particularly true in the areas of divorce, child support, and paternity, where the court decided 7 and 2 cases, respectively. In 2000, the court issued no decisions involving divorce or paternity, and in 2001 there were only 3 decisions involving divorce or child support questions. The court continues its vigorous interest in the Indiana Constitution with 29 opinions involving such issues. The court also decided 7 death penalty cases, affirming 6 and reversing 1 such case.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	22	20	42	4	2	6	2	3	5
Dickson, J. ^e	28	8	36	3	0	3	4	9	13
Sullivan, J. ^e	22	6	28	3	1	4	9	7	16
Boehm, J. ^e	18	19	36	4	2	6	5	8	13
Rucker, J. ^e	15	7	22	3	1	4	8	6	14
Per Curiam	1	24	25						
Total	106	84	190	17	6	23	28	33	61

^a These are opinions and votes on opinions by each justice and in per curiam in the 2002 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

^c This category includes both written concurrences, joining in written concurrence and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Justices declined to participate in the following causes: State Bd. of Tax Comm'rs v. New Castle Lodge # 147, 765 N.E.2d 1257 (Ind. 2002) (Boehm, J. not participating); Koorsen Protective Servs., Inc. v. Carlisle, 762 N.E.2d 459 (Ind. 2002) (Sullivan, J. not participating); and Swaynie v. State, 762 N.E.2d 112 (Ind. 2002) (Dickson, J. not participating).

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		67	67	65	68
	S		2	3	0	0
	D	---	69	70	65	68
	N		83	83	82	83
	P		83.1%	83.1%	79.3%	81.9%
Dickson, J.	O	67		63	65	70
	S	2		0	1	3
	D	69	---	63	66	73
	N	83		83	82	83
	P	83.1%		75.7%	80.5%	88.0%
Sullivan, J.	O	67	63		60	65
	S	3	0		2	2
	D	70	63	---	62	67
	N	83	83		81	82
	P	83.1%	75.7%		76.5%	81.7%
Boehm, J.	O	65	65	60		66
	S	0	1	2		2
	D	65	66	62	---	68
	N	82	82	81		82
	P	79.3%	80.5%	76.5%		82.9%
Rucker, J.	O	68	70	65	66	
	S	0	3	2	2	
	D	68	73	67	68	---
	N	83	83	82	82	
	P	81.9%	88.0%	81.7%	82.9%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 67 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES⁸

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		96	93	97	95
	S		1	0	0	0
	D	—	97	93	98	95
	N		102	103	103	103
	P		95.1%	90.3%	95.1%	92.2%
Dickson, J.	O	96		88	91	90
	S	1		0	1	2
	D	97	---	88	92	92
	N	102		103	102	102
	P	95.1%		85.4%	90.2%	90.2%
Sullivan, J.	O	93	88		91	89
	S	0	0		1	2
	D	93	88	---	92	91
	N	103	103		103	103
	P	90.3%	85.4%		89.3%	88.3%
Boehm, J.	O	97	91	91		91
	S	0	1	1		1
	D	98	92	92	-	92
	N	103	102	103		103
	P	95.1%	90.2%	89.3%		89.3%
Rucker, J.	O	95	90	89	91	
	S	0	2	2	1	
	D	95	92	91	92	---
	N	103	102	103	103	
	P	92.2%	90.2%	88.3%	89.3%	

⁸ This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 96 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES^h

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		143	158	150	152
	S		4	5	3	1
	D	---	147	163	153	153
	N		182	180	180	180
	P		80.7%	90.5%	85.0 %	85.0 %
Dickson, J.	O	143		137	137	139
	S	4		0	8	5
	D	147	---	137	145	144
	N	182		180	180	180
	P	80.7%		76.1%	80.5 %	80.0 %
Sullivan, J.	O	158	137		141	146
	S	5	0		3	3
	D	163	137	---	144	149
	N	179	180		178	178
	P	90.5%	76.1%		80.9 %	83.7 %
Boehm, J.	O	150	137	141		140
	S	3	8	3		5
	D	153	145	144	---	145
	N	180	180	178		178
	P	85.0%	80.5 %	80.9%		81.5 %
Rucker, J.	O	152	139	146	150	
	S	1	5	3	5	
	D	153	144	148	145	--
	N	180	180	178	178	
	P	85.0%	80.0%	83.7 %	81.5%	

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 143 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2002. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASESⁱ

Unanimous ^j			Unanimous with Concurrence ^k			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
82	60	144 (74.2%)	5	0	5 (2.6%)	22	23	45 (23.2%)	194

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percent of overall opinions with concurrence and overall opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, C.J., Dickson, J., Boehm, J.	4
2. Shepard, C.J., Dickson, J., Rucker, J.	5
3. Shepard, C.J., Sullivan, J., Boehm, J.	4
4. Shepard, C.J., Sullivan, J., Rucker, J.	2
5. Shepard, C.J., Dickson, J., Sullivan, J.	3
6. Shepard, C.J., Boehm, J., Rucker, J.	1
7. Boehm, J., Sullivan, J., Rucker, J.	1
8. Boehm, J., Dickson, J., Rucker, J.	2
9. Dickson, J., Sullivan, J., Rucker, J.	2
10. Boehm, J., Rucker, J.	1
11. Sullivan, J., Rucker, J.	1
Total ⁿ	26

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 2001 term's 3-2 decisions were:

1. Shepard, C. J., Dickson, J., Boehm, J.: *French v. State*, 778 N.E.2d 816 (Ind. 2002) (Boehm, J.); *In re Williams*, 764 N.E.2d 613 (Ind. 2002) (per curiam); *Tincher v. Davidson*, 762 N.E.2d 1221 (Ind. 2002) (Dickson, J.); and *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002) (Dickson, J.).

2. Shepard, C.J., Dickson, J., Rucker, J.: *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002) (per curiam); *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002) (Rucker, J.); *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002) (Dickson, J.); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002) (Dickson, J.); and *Vadas v. Vadas*, 762 N.E.2d 1234 (Ind. 2002) (Shepard, C.J.).

3. Shepard, C.J., Sullivan, J., Boehm, J.: *In re Allen*, Cause No. 64S00-9907-DI-401, 2002 WL 31053870 (Ind. 2002) (per curiam); *Turley v. Hyten*, 772 N.E.2d 993 (Ind. 2002) (Sullivan, J.); *Ind. High Sch. Athletic Assoc., Inc. v. Martin*, 765 N.E.2d 1238 (Ind. 2002) (Sullivan, J.); and *Love v. State*, 761 N.E.2d 806 (Ind. 2002) (Sullivan, J.).

4. Shepard, C.J., Sullivan, J., Rucker, J.: *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002) (Shepard, C.J.); and *State v. Adams*, 762 N.E.2d 728 (Ind. 2002) (Sullivan, J.).

5. Shepard, C.J., Dickson, J., Sullivan, J.: *In re Webster*, 776 N.E.2d 1210 (Ind. 2002) (per curiam); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002) (Sullivan, J.); and *Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002) (Sullivan, J.).

6. Shepard, C.J., Boehm, J., Rucker, J.: *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002) (Boehm, J.)

7. Boehm, J., Sullivan, J., Rucker, J.: *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002) (Boehm, J.).

8. Boehm, J., Dickson, J., Rucker, J.: *Ray-Hayes v. Heinemann*, 768 N.E.2d 899 (Ind. 2002) (Boehm, J.); and *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002) (Boehm, J.).

9. Dickson, J., Sullivan, J., Rucker, J.: *In re Loosemore*, 771 N.E.2d 1154 (Ind. 2002) (per curiam); and *Smith v. State*, 770 N.E.2d 818 (Ind. 2002) (Rucker, J.).

10. Boehm, J., Rucker, J.: *State ex. rel. Ind. State Bar Assoc. v. Miller*, 770 N.E.2d 328 (Ind. 2002) (Boehm, J.) (Sullivan, J., concurring in result).

11. Sullivan, J., Rucker, J.: *St. Vincent Hosp. v. Steele*, 766 N.E.2d 699 (Ind. 2002) (Rucker, J.) (Shepard, C.J., and Boehm, J., concurring in separate opinions).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed or Vacated ^P	Affirmed	Total
Civil Appeals Accepted for Transfer	46 (86.7%)	7 (13.3%)	53
Direct Civil Appeals	4 (66.7%)	2 (33.3%)	6
Criminal Appeals Accepted for Transfer	29 (74.4%)	10 (25.6%)	39
Direct Criminal Appeals	21 (30.0%)	49 (70.0%)	70
Total	100 (59.5%)	68 (40.4%)	168 ^q

^o Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56 and also pursuant to Rules of Procedure for Original Actions. All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

^P Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term "reverse" is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically "vacates" every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, "reverse" or "vacate" simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 23 attorney and judicial discipline opinions or one opinion related to certified questions. These opinions did not reverse, vacate, or affirm any other court's decision. This also does not include 10 opinions which considered petitions for post conviction relief.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 2002^r

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^s	193 (76.6%)	59 (23.4%)	252
Criminal ^t	339 (90.2%)	37 (9.8%)	376
Juvenile	25 (92.6%)	2 (7.4%)	27
Total	557 (85.0%)	98 (15.0%)	655

^r This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).

^s This also includes petitions to transfer in tax cases and worker's compensation cases.

^t This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^u

Original Actions	Number
• Certified Questions	0
• Writs of Mandamus or Prohibition	1 ^v
• Attorney Discipline	20 ^w
• Judicial Discipline	3 ^x
Criminal	
• Death Penalty	7 ^y
• Fourth Amendment or Search and Seizure	10 ^z
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	0
Real Estate or Real Property	4 ^{aa}
Personal Property	0
Landlord-Tenant	1 ^{bb}
Divorce or Child Support	7 ^{cc}
Children in Need of Services (CHINS)	0
Paternity	2 ^{dd}
Product Liability or Strict Liability	4 ^{ee}
Negligence or Personal Injury	7 ^{ff}
Invasion of Privacy	0
Medical Malpractice	2 ^{gg}
Indiana Tort Claims Act	2 ^{hh}
Statute of Limitations or Statute of Repose	0
Tax, Department of State Revenue, or State Board of Tax Commissioners	4 ⁱⁱ
Contracts	6 ^{jj}
Corporate Law or the Indiana Business Corporation Law	1 ^{kk}
Uniform Commercial Code	0
Banking Law	0
Employment Law	1 ^{ll}
Insurance Law	7 ^{mm}
Environmental Law	0
Consumer Law	1 ⁿⁿ
Worker's Compensation	2 ^{oo}
Arbitration	0
Administrative Law	3 ^{pp}
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	3 ^{qq}
Indiana Constitution	29 ^{rr}

^u This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2002. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this table.

^v *State ex. rel. Kaufman v. Lake Cir. Ct.*, 768 N.E.2d 431 (Ind. 2002).

^w *In re Beckner*, 778 N.E.2d 806 (Ind. 2002); *In re Clayton*, 778 N.E.2d 404 (Ind. 2002); *In re Fairchild*, 777 N.E.2d 726 (Ind. 2002); *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002); *In re Webster*, 776 N.E.2d 1210 (Ind. 2002); *In re Anonymous*, 775 N.E.2d 1094 (Ind. 2002); *In re Garipey*, 775 N.E.2d 1091 (Ind. 2002); *In re Allen*, Case No. 64S00-9907-DI-401, 2002 WL 31053870 (Ind. 2002); *In re Page*, 774 N.E.2d 49 (Ind. 2002); *In re Loosemore*, 771 N.E.2d 1154 (Ind. 2002); *In re Hefron*, 771 N.E.2d 1157 (Ind. 2002); *In re Coale*, 775 N.E.2d 1079 (Ind. 2002); *In re Foos*, 770 N.E.2d 335 (Ind. 2002); *In re Pacior*, 770 N.E.2d 273 (Ind. 2002); *In re Uttermohlen*, 768 N.E.2d 449 (Ind. 2002); *In re Scahill*, 767 N.E.2d 976 (Ind. 2002); *In re Brown*, 766 N.E.2d 363 (Ind. 2002); *In re Wilder*, 764 N.E.2d 617 (Ind. 2002); *In re Williams*, 764 N.E.2d 613 (Ind. 2002); and *In re Davidson*, 761 N.E.2d 854 (Ind. 2002).

^x *In re Kern*, 774 N.E.2d 878 (Ind. 2002); *In re Kern*, 775 N.E.2d 676 (Ind. 2002); and *In re Morton*, 770 N.E.2d 827 (Ind. 2002).

^y *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002) (reversing); *Wrinkles v. State*, 776 N.E.2d 905 (Ind. 2002) (affirming); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002) (affirming); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002) (affirming); *Stevens v. State*, 770 N.E.2d 739 (Ind. 2002) (affirming); *State v. Barker*, 768 N.E.2d 425 (Ind. 2002) (affirming); and *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002) (affirming).

^z *Warren v. State*, 760 N.E.2d 608 (Ind. 2002); *Adams v. State*, 762 N.E.2d 737 (Ind. 2002); *State v. Adams*, 762 N.E.2d 728 (Ind. 2002); *Lander v. State*, 762 N.E.2d 1208 (Ind. 2002); *Linke v. Northwestern Sch. Corp.*, 769 N.E.2d 972 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002); *Ratiff v. State*, 770 N.E.2d 807 (Ind. 2002); *Abel v. State*, 773 N.E.2d 276 (Ind. 2002); *Warner v. State*, 773 N.E.2d 239 (Ind. 2002); and *White v. State*, 772 N.E.2d 408 (Ind. 2002).

^{aa} *Hall Drive Ins., Inc. v. City of Fort Wayne*, 773 N.E.2d 259 (Ind. 2002); *City of Fort Wayne v. Certain Southwest Annexation Area Landowners*, 764 N.E.2d 221 (Ind. 2002); *Bradley v. City of New Castle*, 764 N.E.2d 212 (Ind. 2002); and *Harrison v. Thomas*, 761 N.E.2d 816 (Ind. 2002).

^{bb} *Turley v. Hyten*, 772 N.E.2d 993 (Ind. 2002).

^{cc} *Stronger v. Sorrell*, 776 N.E.2d 363 (Ind. 2002); *Fobar v. Vonderahe*, 771 N.E.2d 57 (Ind. 2002); *Kirk v. Kirk*, 770 N.E.2d 304 (Ind. 2002); *In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002); *Dunson v. Dunson*, 769 N.E.2d 1120 (Ind. 2002); *Vadas v. Vadas*, 762 N.E.2d 1234 (Ind. 2002); and *In re Hambright v. Hambright*, 762 N.E.2d 98 (Ind. 2002).

^{dd} *In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002); and *Vadas v. Vadas*, 762 N.E.2d 1234 (Ind. 2002).

^{ee} *Camplin v. ACandS, Inc.*, 768 N.E.2d 428 (Ind. 2002); *Martin v. ACandS, Inc.*, 768 N.E.2d 426 (Ind. 2002); *Stegemoller v. ACandS*, 767 N.E.2d 974 (Ind. 2002).

^{ff} *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891 (Ind. 2002); *Sears v. Griffin*, 771 N.E.2d 1136 (Ind. 2002); *R.L. McCoy, Inc. v. Jack*, 772 N.E.2d 987 (Ind. 2002); *Becker v. Kreilein*, 770 N.E.2d 315 (Ind. 2002); *Robins v. Harris*, 769 N.E.2d 586 (Ind. 2002); *Corr v. Am. Family Ins.*, 767 N.E.2d 535 (Ind. 2002); and *Ray-Hayes v. Heinemann*, 760 N.E.2d 172 (Ind. 2002).

^{gg} *Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002); and *Goleski v. Fritz*, 768 N.E.2d 889 (Ind. 2002).

^{hh} *Catt v. Bd. of Comm'rs*, 779 N.E.2d 1 (Ind. 2002); and *State v. Willits*, 773 N.E.2d 808 (Ind. 2002).

ⁱ *Marshall County Tax Awareness Comm. v. Quivey*, 780 N.E.2d 380 (Ind. 2002); *State Bd. Of Tax Comm'r. v. Garcia*, 766 N.E.2d 341 (Ind. 2002); *State Bd. Of Tax Comm'r. v. New Castle Lodge # 147*, 765 N.E.2d 1257 (Ind. 2002); and *State v. Adams*, 762 N.E.2d 728 (Ind. 2002).

^{jj} *Mercantile Nat'l Bank of Ind. v. First Builders of Ind., Inc.*, 774 N.E.2d 488 (Ind. 2002); *R.L. McCoy, Inc. v. Jack*, 772 N.E.2d 987 (Ind. 2002); *Green v. Hendrickson Publishers, Inc.*, 770 N.E.2d 784 (Ind. 2002); *Allen v. Great Am. Reserve Ins. Co.*, 766 N.E.2d 1157 (Ind. 2002); *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524 (Ind. 2002); and *Harrison v. Thomas*, 761 N.E.2d 816 (Ind. 2002).

^{kk} *Young v. Gen. Acceptance Corp.*, 770 N.E.2d 298 (Ind. 2002).

^{ll} *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699 (Ind. 2002).

^{mm} *Bowers v. Kushnick*, 774 N.E.2d 884 (Ind. 2002); *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002); *Corr v. Shultz*, 767 N.E.2d 541 (Ind. 2002); *Corr v. Am. Family Ins.*, 767 N.E.2d 535 (Ind. 2002); *Allen v. Great Am. Reserve Insurance Co.*, 766 N.E.2d 1157 (Ind. 2002); *State Farm Fire & Cas. Comp. v. T.B.*, 762 N.E.2d 1227 (Ind. 2002); and *Beam v. Wausau Insurance Co.*, 765 N.E.2d 524 (Ind. 2002).

ⁿⁿ *Bowers v. Kushnick*, 774 N.E.2d 884 (Ind. 2002).

^{oo} *Sims v. U.S. Fid. & Guar. Co.*, 782 N.E.2d 345 (Ind. 2002); *City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2002).

^{pp} *South Gibson Sch. Bd. v. Sollman*, 768 N.E.2d 437 (Ind. 2002); *Family & Soc. Servs. Admin. v. Schluttenhofer*, 768 N.E.2d 885 (Ind. 2002); and *Ind. Fireworks Distribs. Ass'n v. Boatwright*, 764 N.E.2d 208 (Ind. 2002).

^{qq} *Ind. Fireworks Distribs. Ass'n v. Boatwright*, 764 N.E.2d 208 (Ind. 2002); *South Gibson Sch. Bd. v. Sollman*, 768 N.E.2d 437 (Ind. 2002); and *Family & Soc. Servs. Admin. v. Schluttenhofer*, 768 N.E.2d 885 (Ind. 2002).

^{rr} *Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002); *Warner v. State*, 773 N.E.2d 239 (Ind. 2002); *White v. State*, 772 N.E.2d 408 (Ind. 2002); *Garner v. State*, 777 N.E.2d 721 (Ind. 2002); *Bush v. State*, 775 N.E.2d 309 (Ind. 2002); *Robinson v. State*, 775 N.E.2d 316 (Ind. 2002); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002); *Williams v. State*, 771 N.E.2d 70 (Ind. 2002); *McAbee v. State*, 770 N.E.2d 802 (Ind. 2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002); *Davis v. State*, 770 N.E.2d 319 (Ind. 2002); *Gross v. State*, 769 N.E.2d 1136 (Ind. 2002); *Henderson v. State*, 769 N.E.2d 172 (Ind. 2002); *Buchanan v. State*, 767 N.E.2d 967 (Ind. 2002); *Tyson v. State*, 766 N.E.2d 715 (Ind. 2002); *Bald v. State*, 766 N.E.2d 1170 (Ind. 2002); *Lake County Clerk's Office v. Smith*, 766 N.E.2d 707 (Ind. 2002); *Corbett v. State*, 764 N.E.2d 622 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002); *Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002); *Lander v. State*, 762 N.E.2d 1208 (Ind. 2002); *Swaynie v. State*, 762 N.E.2d 112 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Pierce v. State*, 761 N.E.2d 826 (Ind. 2002); and *Murray v. State*, 761 N.E.2d 406 (Ind. 2002).

APPELLATE PROCEDURE

DOUGLAS E. CRESSLER*

INTRODUCTION

During the year 2000, appellate practitioners prepared for a completely revised set of appellate rules that would go into effect January 1, 2001. The year 2001 was a time of transition from the old rules to the new. In 2002, the new appellate rules settled in and became the normal mode of operation.

This Article examines recent opinions, orders, and other developments in the area of state appellate procedure in Indiana.¹ In Part I of the Article, a brief history of the appellate rule revision process is recounted. Part II examines the most recent appellate rule amendments that were promulgated and previews possible future amendments. In Part III, the cases of significance are discussed. Miscellaneous matters of possible interest are highlighted in Part IV.

The new appellate rules themselves were not a particularly fruitful source of interpretive case law this past year. The fact that the new rules were not the cause of any significant procedural controversy suggests they are working well. Rather, as discussed in Part III, the most important cases resurrected or refined older and seldom seen procedural doctrines.

I. A BRIEF VISIT TO THE PAST

Before looking at current developments, however, a quick review of an important preceding event is warranted. The completely rewritten Rules of Appellate Procedure that went into effect at the start of the year 2001 have been discussed at length elsewhere and there is no need to reexamine their origin or significance in detail.² However, a rudimentary overview why and how the new rules came into being may be helpful.³

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1. This Article covers the time period from November 1, 2001, until October 1, 2002.

2. See, e.g., Douglas E. Cressler, *A Year of Transition in Appellate Practice*, 35 IND. L. REV. 1133 (2002); Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 744-47 (2001); George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: New Appellate Rules, a Constitutional Amendment, and a Proposal*, 33 IND. L. REV. 1275 (2000).

3. The complete rewriting of the Rules of Appellate Procedure can trace its genesis to a single point and place in time: the lunch hour, Monday, September 29, 1997 in the cafeteria of the Indiana South Government Center. The Appellate Practice Section of the Indiana State Bar Association was about to wrap up its inaugural year in operation under its first Section Chair, George T. Patton, Jr. On that date, Mr. Patton had lunch with the Honorable Edward W. Najam, Jr., judge of the Indiana Court of Appeals. Judge Najam was also the chair-elect and was about to assume leadership of the Section. As part of his vision for the future of the Section, Judge Najam expressed the idea of forming a large project team to rewrite all the appellate rules from beginning

Committees made up of members of the Indiana State Bar Association's Appellate Practice Section performed the initial analyses of the old rules and drafting of the new. Further redrafting was done by the Indiana Supreme Court Rules Committee and final revisions were made by the Indiana Supreme Court. The end product was a completely new set of Rules of Appellate Procedure.⁴ The new rules went into effect beginning with any appeal initiated on or after January 1, 2001.⁵

The goals of the revision process included making the appellate process easier to understand, more streamlined, and more uniform in practice.⁶ While much of the language carried over from the old rules to the new, there were many substantive changes. The rules governing appellate procedure were reorganized and renumbered. Changes and additions were made to the nomenclature of appeal work, in the timing for many aspects of taking an appeal, in motion practice, and in the procedures for seeking transfer of jurisdiction to the Indiana Supreme Court. The greatest changes brought about by the new rules, however, were in the process by which the record on appeal is prepared and presented to the appellate court.

Near the end of the first year the rules were in operation, the state high court adopted a few substantive amendments.⁷ Those amendments were discussed extensively in last year's survey issue.⁸

With this background, we turn to more recent developments in Indiana appellate procedure.

II. RULE AMENDMENTS

A. *Adopted in 2002*

The supreme court adopted four amendments to the Rules of Appellate

to end, an idea readily embraced by Mr. Patton. Ultimately, dozens of lawyers and judges would donate their energy and expertise to the Appellate Rules Project. Chief Justice Randall T. Shepard has expressly recognized the "enormous commitment of time and talent from practitioners . . . [to whom] we all owe a substantial debt." GEORGE T. PATTON, JR., *INDIANA APPELLATE PRACTICE*, at xiii-xiv (3d ed. 2001). To the Chief Justice's comment, this author would add only that the justices of the Indiana Supreme Court also spent many hours reviewing and making final revisions to the proposed rules. But let the record show that Judge Ted Najam is the original founding father of the modern appellate rules in Indiana.

4. See generally George T. Patton, Jr., *Appellate Rules Proposal Before Rules Committee*, RES GESTAE, Apr. 1999, at 10-11.

5. See Order Amending Indiana Rules of Appellate Procedure (Ind. Feb. 4, 2000) (No. 94S00-0002-MS-77).

6. Patton, *supra* note 2, at 1276.

7. See Order Amending Indiana Rules of Appellate Procedure (Ind. Dec. 21, 2001) (No. 94S00-0101-MS-67).

8. See Cressler, *supra* note 2, at 1134-40.

Procedure during the past year.⁹ Three of those changes are discussed below. The fourth amendment, not discussed herein, was a change to the language of Indiana Appellate Rule 7(B) (Appellate Rule), which governs the scope of appellate review of criminal sentences. This particular amendment is better addressed in its possible impact on substantive criminal law than as a matter of appellate procedure.¹⁰ These amendments went into effect January 1, 2003.¹¹

The first of the three changes was to Appellate Rule 14(B)(1)(a). That rule was amended to require a trial court to make a finding of good cause if it grants a belated motion to certify an interlocutory appeal.¹²

The second and third changes codified informal practices of the supreme court. As amended, Appellate Rule 16(F) now provides that once an attorney has entered an appearance or been granted leave to appear *pro hac vice* before the Indiana Court of Appeals or Indiana Tax Court, that attorney need not again file a renewed appearance or seek further admission in any continuance of the case before the Indiana Supreme Court.¹³ Similarly, Appellate Rule 41(B) was amended to state that once an entity is granted *amicus curiae* status before the court of appeals or tax court, it retains *amicus* status in any continuation of that case before the supreme court.¹⁴

In a rule-related development, the high court also issued an order establishing certain standards for record transcription in the state courts. Appellate Rule 30(A)(3) authorizes the Division of State Court Administration to determine standards for the software and media used in the creation and preservation of transcripts. The Division created such standards during the reporting period, and the supreme court approved those standards by order, effective April 1, 2002.¹⁵ Four technical standards were approved, as follows:

Standard 1. The electronic Transcript must comply with all of the requirements set out in Appellate Rule 30.

Standard 2. The Transcript of the evidence may be prepared in any commercially available word processing software system.

9. See Order Amending Indiana Rules of Appellate Procedure (Ind. July 19, 2002) (No. 94S00-0201-MS-61).

10. *Id.* Specifically, IND. APP. R. 7(B) was amended as follows: "The Court ~~shall not~~ may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." *Id.* One commentator has observed, "only time will tell whether the seemingly relaxed language of the new rule will ease the road to sentence reduction." Joel Schumm, *The Mounting Confusion Over Double Jeopardy in Indiana*, RES GESTAE, Oct. 2002, at 27, 29.

11. Order Amending Indiana Rules of Appellate Procedure, *supra* note 9, at 3.

12. *Id.*

13. *Id.*

14. *Id.*

15. See Order Approving Technical Standards for Digital Transcripts (Ind. Jan. 31, 2002) (No. 94S00-0201-MS-61).

Standard 3. Pursuant to Appellate Rule 30(A)(5), the court reporter shall transcribe the evidence on sequentially numbered disks in the event more than one disk is required for complete transcription. Multiple discs [sic] or sets of sequential numbered disks shall be prepared and designated as:

- a. "Official record"
- b. "Official working copy"
- c. "Court reporter's copy"
- d. "Party copy"

The court reporter must convert the "official record," the "official working copy" and the "party copy" into Adobe Portable Document Format (PDF) and transmit these copies in PDF format as set out in Appellate Rule 30.

Standard 4. Pursuant to Appellate Rule 30(B), the court reporter shall retain a signed, read only "court reporter's copy" of the electronic Transcript in the original word processing version used for the transcription.¹⁶

While these standards are directed to court reporters, the well-informed appellate lawyer should be aware of these standards governing the submission of electronic records.

B. Possibly On the Horizon

During the reporting period, the Appellate Practice Section of the Indiana State Bar Association (Section) undertook a survey and review of the appellate rules. Survey forms were sent to the 330 members of the Section. Judges, trial court clerks, and court reporters were also notified of the survey and asked to respond with comments. Approximately one hundred responses were received from lawyers and court staff. The Section quickly took steps to act on the survey results.

An *ad hoc* committee of the Section performed an initial evaluation of the survey results and determined that there were two recommendations that were of particular value that could be addressed fairly straightforwardly. The Honorable Patricia Riley, judge of the Indiana Court of Appeals, was chair of the Section and spearheaded the survey project. On October 29, 2002, Judge Riley sent a letter to the Supreme Court Committee on Rules of Practice and Procedure (Committee)¹⁷ explaining the survey process and identifying the two immediate recommendations for rule amendments.¹⁸

First, the letter asked that the Committee consider making a recommendation to the supreme court for an amendment that would eliminate a perceived

16. *Id.*

17. The Committee is responsible for making recommendations to the Indiana Supreme Court for amendments to the rules governing trial and appellate practice in the Indiana state court system. See IND. TRIAL R. 80.

18. A copy of this letter is on file with the author.

redundancy found in Appellate Rules 11(A) and 10(D).

These rules currently provide as follows. When a transcript has been requested and ultimately completed, Appellate Rule 11(A) requires the court reporter to file the transcript with the trial court clerk. The court reporter is also required by that rule to “provide notice to all parties to the appeal that the transcript has been filed with the clerk of the trial court.”¹⁹ Within five days after the transcript is filed, in accordance with Appellate Rule 10(D), the trial court clerk is then required to file and serve on all the parties a notice that the transcript has been completed. When a transcript has been requested, it is generally the filing of the Rule 10(D) notice of completion that serves as the trigger date for determining when the appellant’s brief must be filed.²⁰

The Section suggested that the service of the Rule 11(A) notice of *filing* and the service of the Rule 10(D) notice of the *completion* of the transcript were redundant and confusing process and that the process should be simplified.

Second, the letter suggested the possibility of amending Appellate Rule 15(B) to clarify the time for filing the appellant’s case summary in interlocutory appeals.

Rule 15(B) currently provides

[t]he Appellant’s Case Summary shall be filed within thirty (30) days of the filing of the Notice of Appeal or, in the case of an interlocutory appeal under Rule 14, at the same time as the filing of either the Notice of Appeal with the trial court clerk or the motion to the court of appeals requesting permission to file an interlocutory appeal.²¹

The Section stated in its letter that this language is confusing because it arguably allows the appellant a choice about when to file the appellant’s case summary in an interlocutory appeal. The Section proposed that Rule 15(B) be amended by inserting the following underscored language:

The Appellant’s Case Summary shall be filed within thirty (30) days of the filing of the Notice of Appeal or, in the case of an interlocutory appeal under Rule 14, at the same time as the filing of either the Notice of Appeal with the trial court clerk under Rule 14(A) for Interlocutory Appeals of Right or the motion to the Court of Appeals requesting permission to file an interlocutory appeal under Rule 14(B)(2) for Discretionary Interlocutory Appeals.

The Section suggested that an amendment of this nature appears consistent with the case summary’s function as the appellant’s appearance²² and with the

19. IND. APP. R. 11(A).

20. See IND. APP. R. 45(B)(1)(b). If no transcript is requested or if it has already been completed before the clerk has issued a notice of completion of the clerk’s record pursuant to Appellant Rule 10(C), then the Rule 10(C) filing date serves as the trigger date. See IND. APP. R. 45(B)(1).

21. IND. APP. R. 15(B).

22. See IND. APP. R. 16(A).

requirement for an appellant to file a case summary before being allowed to file any other papers or motions.²³

The Committee will consider these suggestions in due course and may ultimately make recommendations to the supreme court in accordance with the timetables and procedures of Indiana Trial Rule 80.

Judge Riley's letter on behalf of the section also stated that the Section will be forming committees to further study the survey responses. Most of the survey comments focused on record related issues, so additional recommendations in that area of appellate procedure may be forthcoming from the Section.

III. DEVELOPMENTS IN THE CASE LAW

A. Sometimes a Final Judgment Isn't

Although the opinion in *Ramco Industries, Inc. v. C & E Corp.*²⁴ did not articulate any new procedural rules, it resuscitated some old law and reminded practitioners and trial judges about an important point of appellate procedure.

Ramco Industries was a defendant in a four-count suit. Count I alleged that certain amounts were due the plaintiffs as the result of an arbitration. Counts II and III were breach of contract claims. Alleged tortious interference with business dealings was the basis for Count IV.²⁵ The trial court granted the plaintiffs summary judgment on Count III, determining that Ramco had breached certain provisions of a contract. However, the court reserved the question of damages for trial.²⁶ Five months later, the plaintiffs filed another summary judgment motion, this time asking that a judgment be entered on Count III in the amount of damages incurred to-date. The trial court ultimately granted this motion as well, and entered judgment in the amount of \$71,017.41.²⁷ The summary judgment order noted that this judgment did not resolve all the disputes between the parties and that even the amounts due as a result of the breach of contract under Count III might not be final. Nevertheless, the trial court expressly found "no just reason for delay"²⁸ in awarding the contract damages and entered partial summary judgment in writing as to less than all the issues and claims.²⁹

The question that then arose was whether the partial summary judgment order was a final judgment under the applicable procedural rules. The answer to this question was critical. If a judgment order is of the discretionary interlocutory variety, it remains subject to modification by the trial court and may

23. See IND. APP. R. 16(E).

24. 773 N.E.2d 284 (Ind. Ct. App. 2002).

25. *Id.* at 286.

26. *Id.* at 287.

27. *Id.*

28. *Id.*

29. *Id.*

be appealed later once a final judgment is entered.³⁰ However, if a judgment order constitutes a final judgment, it must be appealed immediately in order to preserve the right to appeal.³¹

On its face, the order seemed to constitute a final judgment because the trial court had used the “magic language” of finality contained in Trial Rule 56(C), which provides in pertinent part:

[a] summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is not just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.³²

This rule must also be read in conjunction with Appellate Rule 2(H), which defines a “final judgment”³³ to include, among other things, judgment orders wherein the trial court expressly determines that there is no just cause for delay and in writing expressly directs the entry of a partial judgment pursuant to Trial Rule 56(C) or 54(B).³⁴

Faced with what appeared to be a final, appealable judgment order, Ramco initiated an appeal. However, in addition to addressing the merits, Ramco also argued that the trial court erred when it converted an otherwise interlocutory order into a final judgment by stating in writing that there is no just reason for delay. The court of appeals agreed and dismissed the appeal.³⁵

In so doing, the court invoked a somewhat arcane aspect of appellate practice: a trial court’s authority to make judgments final pursuant to Trial Rules 54(B) and 56(C) is not unfettered. A partial judgment order containing the special language of finality issued under these rules must nevertheless “possess the requisite degree of finality, and must dispose of at least a single substantive claim” to be properly considered appealable.³⁶ The appellate court is not bound by the trial court’s determination of finality under Trial Rules 54(B) and 56(C), and the propriety of the trial court’s addition of the “magic language” of finality

30. *Lutheran Hosp. of Ft. Wayne, Inc. v. Doe*, 639 N.E.2d 687, 689 n.5 (Ind. Ct. App. 1994); *Haskell v. Peterson Pontiac GMC Trucks*, 609 N.E.2d 1160, 1163 (Ind. Ct. App. 1993). Alternatively, a party could seek to immediately appeal a discretionary interlocutory order or judgment through the procedures described in Indiana Appellate Rule 14(B).

31. IND. APP. R. 9(A).

32. IND. TRIAL R. 56(C) (in part). There is similar language in Trial Rule 54(B), which governs general judgments. Another case decided during the reporting period highlighted the importance of the express determination of no just reason for delay in judgments in establishing when appellate rights arise. *See Rayle v. Bolin*, 769 N.E.2d 636 (Ind. Ct. App. 2002) (dismissing appeal of a judgment that did not include the formalistic language requirements of Trial Rule 54(B)).

33. IND. APP. R. 2(H)(2).

34. *Id.*

35. *Ramco*, 773 N.E.2d at 289.

36. *Id.* at 288 (quoting *Legg v. O’Connor*, 557 N.E.2d 675, 676 (Ind. Ct. App. 1990)).

is reviewable under an abuse of discretion standard.³⁷

In this particular circumstance, the court of appeals determined that the trial court had abused its discretion. The court noted that the first partial summary judgment order only established partial liability and reserved the damages assessment for later, and that the second partial summary judgment order determined only an interim amount of damages.³⁸ Concerned about the prospect of piecemeal litigation, the court of appeals concluded that the trial court's "order simply does not possess the requisite degree of finality to completely dispose of a single substantive claim" in order to be appealed as a final judgment under Trial Rule 56(C).³⁹

The *Ramco* case serves as a reminder of the powerful appellate procedural mechanisms embodied in Trial Rules 54(B) and 56(C). Many or most partial judgment orders would generally only be appealable if the processes of Appellate Rule 14(B) are followed. That is, the trial court must first certify the order for interlocutory appeal and the appellate court must then accept the appeal, subject to a showing that the requisite grounds for allowing an early appeal have been demonstrated.⁴⁰ However, Trial Rules 54(B) and 56(C), when read in conjunction with Appellate Rule 2(H)(2), allow a trial court to unilaterally determine that a judgment order is immediately final and appealable. In the vast majority of cases, the determination of finality by the trial court will not be contested on appeal. However, *Ramco* illustrates that the trial court's authority to unilaterally create appellate rights under Trial Rules 54(B) and 56(C) has its limits.

When faced with a judgment order in which the "magic language" of Trial Rules 54(B) or 56(C) has been used, the party against whom judgment has been entered should presume that the judgment order is appealable and if not immediately appealed, that the right to appeal of that judgment order will be forfeited.⁴¹ However, where the judgment order does not at least fully dispose of a single substantive claim, the appealing party could argue that the trial court abused its discretion in adding the words that turned an otherwise interlocutory order into a final judgment.

A novel twist in the *Ramco* case is that the appealing party successfully argued that its own appeal should be dismissed.

B. The Motion to Follow the Mandate

*KeyBank National Ass'n v. Michael*⁴² was another case that warrants notice in which the court of appeals applied a seldom-used procedural device. The

37. *Id.* (citing *Troyer v. Troyer*, 686 N.E.2d 421, 425 (Ind. Ct. App. 1997)).

38. *Id.* at 289.

39. *Id.*

40. *See* IND. APP. R. 14(B)(1), (2).

41. IND. APP. R. 9(A).

42. 770 N.E.2d 369 (Ind. Ct. App. 2002).

court of appeals itself called the situation “out of the ordinary.”⁴³

In an earlier appeal involving the same parties, the appellate court affirmed the trial court judgment in part and reversed in part, and remanded the case for further proceedings.⁴⁴ Back in the trial court, one of the parties requested and was granted relief by order that was, in the view of KeyBank, inconsistent with one of the several holdings of the earlier opinion of the court of appeals.

KeyBank asked the trial court to certify the order for interlocutory appeal, but the trial court refused.⁴⁵ KeyBank then went directly back to the court of appeals and filed a motion under the cause number from the previous appeal. KeyBank referred to its motion as a “Petition for Writ in Aid of Appellate Jurisdiction and/or Writ of Mandate.”⁴⁶

KeyBank argued in its motion that the trial court had failed to follow the mandate of the opinion of the court of appeals. It asked the court to issue an order requiring the trial court to follow the directives of the appellate court.⁴⁷ The opposing party urged the court of appeals to dismiss the motion on jurisdictional grounds, arguing that KeyBank should be required to do what any party aggrieved of a trial court decision ordinarily must do: appeal the trial court’s judgment at the appropriate time.⁴⁸ The court of appeals stated as follows:

We certainly agree that the traditional procedural path is the preferred route in the overwhelming majority of cases. We believe, however, that there are situations in which the extraordinary remedy of issuing a writ is appropriate. One such situation would involve cases where a trial court issues a ruling upon remand that is inconsistent with an appellate decision previously rendered in the same action.⁴⁹

The court also cautioned that even under those circumstances, a writ would be appropriate only in those comparatively few instances where it would serve the interest of judicial economy or may serve to prevent an irreparable harm.⁵⁰ The court ultimately granted KeyBank’s motion with a published opinion instructing the trial court on the steps it needed to follow to comply with the court’s earlier opinion.⁵¹

Although the court of appeals cited no opinion directly authorizing the procedure that was followed in this case, the court was clearly on firm and ancient procedural footing. One hundred and thirty-two years ago, the Indiana

43. *Id.* at 371.

44. *KeyBank Nat’l Ass’n v. Michael*, 737 N.E.2d 834, 854 (Ind. Ct. App. 2000), *with later opinion in aid of appellate jurisdiction*, 770 N.E.2d 369 (Ind. Ct. App. 2002).

45. 770 N.E.2d at 374.

46. *Id.* at 371.

47. *Id.* at 374.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 376.

Supreme Court issued an opinion directing a trial court to follow the mandate of the high court's earlier opinion.⁵² The best-known "modern" case articulating and approving the procedures that were followed in the *KeyBank* case is *Skendzel v. Marshall*,⁵³ dating from 1975.

As the court of appeals indicated, it should be a rare case where a trial court would fail to follow the dictates of the appellate court on remand from an appeal. However, if that unusual circumstance should arise, the original *Skendzel* case, and now *KeyBank*, show that one need not perfect a whole new appeal to challenge the trial court's actions. Rather, the alleged error may be addressed with a motion filed with the appellate court that issued the opinion.

C. *Limitations on the Davis Procedure*

As a general matter, once an appellate court acquires jurisdiction over a case, the trial court is limited in the actions it may take until the appeal ends.⁵⁴ Twenty-five years ago, the Indiana Supreme Court approved a procedure by which an appellant could request the appellate court to voluntarily terminate consideration of an active appeal and allow the appellant to return to the trial court for the purpose of filing a petition seeking post-conviction relief.⁵⁵ The eponymous "*Davis* procedure" thereby permits an appellant who can demonstrate a substantial likelihood of obtaining relief to return to the trial court for post-conviction proceedings.⁵⁶ If the petition seeking post-conviction relief is denied, the appellate court will generally then re-assume jurisdiction over the previously dismissed appeal and consolidate it with the appeal of the denial of post-conviction relief.⁵⁷

The purpose of the *Davis* procedure is to promote judicial economy.⁵⁸ For example, if exculpatory evidence not available during trial is discovered while an appeal is pending, the *Davis* procedure creates an efficient mechanism for holding the appeal in abeyance while the trial court determines whether the petitioner is entitled to relief based on the new evidence. If so, the original appeal becomes moot and can be dismissed with prejudice.⁵⁹

52. *Julian v. Beal*, 34 Ind. 371 (1870).

53. 330 N.E.2d 747 (Ind. 1975).

54. See, e.g., IND. APP. R. 8 (appellate court acquires jurisdiction once notice of completion of clerk's record is filed); IND. APP. R. 65(E) (trial court may not act in reliance on an opinion until final and certified); *Clark v. State*, 727 N.E.2d 18, 20 (Ind. Ct. App. 2000) ("[A]s a general rule, once an appeal is perfected the trial court loses subject matter jurisdiction over the case.")

55. *Davis v. State*, 368 N.E.2d 1149 (Ind. 1977). The court has also established a similar procedure for use in civil proceedings. See *Logal v. Cruse*, 368 N.E.2d 235 (Ind. 1977).

56. 368 N.E.2d at 1151.

57. See, e.g., *Wentz v. State*, 766 N.E.2d 351 (Ind. 2002); *Williams v. State*, 757 N.E.2d 1048 (Ind. Ct. App. 2001) (both cases in which the appeal had been terminated so that the appellant could litigate a post-conviction petition, and then the two appeals were consolidated).

58. 368 N.E.2d at 1151.

59. This has happened on occasion. See, e.g., *Moler v. State*, Cause No. 39S00-9903-CR-179

In *Bellamy v. State*,⁶⁰ the Indiana Supreme Court established limits on appellate court discretion in permitting appellants to request a *Davis* remand.

Lamont Bellamy had been convicted of various crimes and those convictions and sentences had been affirmed on appeal.⁶¹ Bellamy then sought and was denied post-conviction relief, and an appeal of that denial ensued.⁶² While the appeal of the denial of post-conviction relief was pending, Bellamy filed a motion asking the court of appeals to dismiss the appeal and remand the case back to the post-conviction court so that he could file and litigate an *amended* petition for post-conviction relief. The court of appeals granted the motion and dismissed the appeal without prejudice.

The State petitioned to transfer jurisdiction, and the supreme court accepted the appeal. In its opinion, the high court noted that Bellamy's motion sought a remand for two purposes.

First, he wanted to return to the trial court to present additional unspecified evidence in support of the original post-conviction petition. The supreme court determined that this aspect of the motion was simply a request for a new trial without any showing of trial court error.⁶³ The high court determined that the court of appeals had erred in allowing the appellant to return to the post-conviction court to try the same issues again with the hope of a better result.⁶⁴

Second, Bellamy wanted a remand to raise *new* issues in the post-conviction court. In this regard, Bellamy was attempting to invoke the *Davis* procedure. However, *Davis* involved a direct appeal from a judgment of conviction and sentence, whereas Bellamy was appealing from the denial of post-conviction relief.⁶⁵ There is no procedural impediment to filing one initial petition for post-conviction relief. However, if a person convicted of a crime has already once sought post-conviction relief, any future collateral attack on the judgment in the state system are procedurally governed by Post-Conviction Rule 1 § 12, which sets out the requirements for *successive* requests for post-conviction relief. The court concluded, "Among those requirements [of Post-Conviction Rule 1 § 12] is the necessity of tendering a proposed successive petition demonstrating a reasonable possibility of entitlement to post-conviction relief. In these regards, appellant's motion falls well short."⁶⁶

The appeal was remanded to the court of appeals with instructions to vacate

(appeal terminated and case remanded for a post-conviction proceeding in accordance with *Davis* procedure by order dated October 12, 1999; appealed dismissed as moot by order dated January 26, 2000 after relief obtained in post-conviction court in cause number 39C01-9801-CF-3).

60. 765 N.E.2d 520 (Ind. 2002).

61. *Bellamy v. State*, 676 N.E.2d 1110 (Ind. Ct. App. 1997) (table of unpublished memorandum decisions).

62. 765 N.E.2d at 520.

63. *Id.* at 521.

64. *Id.* at 521-22.

65. *Id.* at 521.

66. *Id.* at 522 (citation omitted).

its previous order and to enter an order denying the motion to dismiss.⁶⁷ The high court also suggested that it would be “unlikely” that a *Davis* proceeding would ever be warranted during an appeal from the denial of post-conviction relief.⁶⁸

One of the purposes for the complete revision of the appellate rules discussed in Part I of this Article was to codify some of the procedures previously only made known in case law. The *Davis* procedure provides an example of how that purpose was given effect. The procedures discussed in *Davis* and now limited by *Bellamy* are expressly authorized in Appellate Rule 37, adopted January 1, 2001.

D. Access to the Record in Civil Appeals

In *Theobald v. Hartford Casualty Ins. Co.*,⁶⁹ the court of appeals published an order addressing a point of appellate procedure *prior* to issuing its opinion on the merits. The court wanted to provide procedural guidance concerning access to the appendix during the briefing period in civil cases.

After the appellant in *Theobald* filed its brief and appendix, the appellee requested a copy of the appendix from the appellant and was refused.⁷⁰ Being required to reference the appendix in its brief, the appellee sought to have access to the appendix by borrowing it from the clerk of the appellate courts. This request was also refused by the clerk.⁷¹ The appellee filed a motion with the court of appeals to either require counsel for the appellant to provide a copy of the appendix or to compel the clerk to allow the appellee access to the appendix during its briefing period.

The court of appeals granted the latter request in the published order. In so doing the court held that “in all other civil cases in which counsel for the appellee requests the Appendix for use in preparing the brief of the appellee, the Clerk of this Court is directed to release the Appendix to counsel for the appellee for that purpose.”⁷²

The *Theobald* interlocutory opinion simply gave early effect to a clarifying rule change that had already been adopted by the Indiana Supreme Court. On December 21, 2001, about five weeks before the published opinion in *Theobald*, the high court issued an order amending Appellate Rule 12(C).⁷³ As amended effective April 1, 2002, that rule expressly states that the clerk of the appellate court is to allow the parties to an appeal access to all transcripts and appendices during the period they are working on their briefs.⁷⁴

67. *Id.*

68. *Id.*

69. 762 N.E.2d 785 (Ind. Ct. App. 2002).

70. *Id.* at 786.

71. *Id.*

72. *Id.* at 787.

73. See Order Amending Indiana Rules of Appellate Procedure, *supra* note 7.

74. *Id.*

*E. Late Appeals from the Denial of a Motion to Correct
Erroneous Sentence Disallowed*

Indiana Code § 35-38-1-15 states that if a person convicted of a crime is erroneously sentenced, the person may file a written motion in the sentencing court asking that sentence be corrected.⁷⁵ Richard Lee Davis filed a motion to correct the allegedly erroneous sentence entered on his conviction for conspiracy to commit robbery.⁷⁶ The trial court denied the motion, and Davis attempted an appeal.

However, Davis was late in filing a notice of appeal. The State moved to dismiss the appeal asserting the late notice was a jurisdictional defect, but a panel of the court of appeals denied the motion.⁷⁷ The State raised the jurisdictional issue relating to the late notice of appeal again in its briefing on the merits and again on rehearing, but to no avail.⁷⁸ The supreme court granted the state's petition to transfer jurisdiction.

In its opinion, the court noted the language of Appellate Rule 9: "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule] 2."⁷⁹ Post-Conviction Rule 2 provides a procedure for seeking permission for belated direct appeals, but does not permit belated consideration of appeals of post-conviction judgments.⁸⁰ A motion to correct erroneous sentence is a form of petition for post-conviction relief.⁸¹

In other words, because a motion to correct erroneous sentence is treated as a form of post-conviction proceeding, a late appeal pursuant to Post-Conviction Rule 2 is not authorized. Appellate Rule 9 therefore controls and an appellant, like Davis, who fails to file a timely notice of appeal has forfeited his right to an appeal.⁸²

Thus, when taking an appeal from the denial of a motion to correct erroneous sentence, counsel must be mindful that the forgiveness provided to direct appeals by Post-Conviction Rule 2 is not available. The failure to timely file a notice of appeal will be fatal to the appeal.

F. Constitutionality of Appellate Procedures Upheld

*Wright v. State*⁸³ required the court of appeals to address a constitutional

75. IND. CODE § 35-38-1-15 (2002).

76. *Davis v. State*, 771 N.E.2d 647, 647-48 (Ind. 2002).

77. *Id.* at 648.

78. *Id.*

79. *Id.* (citing IND. APP. R. 9).

80. 771 N.E.2d at 649 (citing *Greer v. State*, 685 N.E.2d 700, 702 (Ind. 1997); *Howard v. State*, 653 N.E.2d 1389, 1390 (Ind. 1995)).

81. *Id.* (citing *State ex rel. Gordon v. Vanderburgh Cir. Ct.*, 616 N.E.2d 8, 9 (Ind. 1993)); *see also Beech v. State*, 702 N.E.2d 1132 (Ind. Ct. App. 1998).

82. 771 N.E.2d at 649.

83. 772 N.E.2d 449 (Ind. Ct. App. 2002).

challenge to the appeals process in Indiana. Jesse Wright was convicted of public intoxication.⁸⁴ He wanted to appeal the conviction and was not indigent, so he had to pay for his own transcript.⁸⁵ Wright apparently purchased a transcript of the trial testimony, but the court reporter did not include a transcript of the *voir dire* of the jury or opening and closing statements. The court reporter would not prepare the additional transcripts without being further compensated and the court of appeals denied a pre-briefing motion asking that the court reporter be compelled to do so.⁸⁶

On appeal, Wright argued that the actions of the court reporter and the court of appeals violated his right to an appeal guaranteed in the Indiana Constitution.⁸⁷ He also claimed that Indiana Appellate Rule 9(H), which requires parties to make satisfactory arrangements for the payment of transcription fees, violates the provision of the Indiana Constitution requiring all court to be open and justice administered freely and without purchase.⁸⁸ In an opinion that is a model of judicial patience, the court of appeals declined to find any defects of constitutional dimension in the handling of Wright's appeal.⁸⁹

G. Rehearing Revisited

The Indiana Supreme Court reminded appellate practitioners that a petition for rehearing is a vehicle by which an appellate court may correct its own omissions or errors, but that a proper petition does not ask the court to generally re-examine all the issues decided against the petitioning party.⁹⁰ The court cited one-hundred-year-old precedent for this fundamental principal.⁹¹

IV. OTHER DEVELOPMENTS

The past year brought with it a typical assortment of appeal-related problems and diversions.

A. Problem Areas in Appellate Briefing

The briefing problems documented by the appellate courts included attempts to raise a new issue in the reply brief,⁹² failure to provide a recitation of the lower

84. *Id.* at 454.

85. *Id.* at 462.

86. *Id.* at 460-62.

87. *Id.*; IND. CONST. art. VII, § 6.

88. 772 N.E.2d at 461; IND. CONST. art. I, § 12.

89. 772 N.E.2d at 461-62.

90. *Griffin v. State*, 763 N.E.2d 450, 450-51 (Ind. 2002) (on rehearing).

91. *Id.* at 451 (citing *Goodwin v. Goodwin*, 48 Ind. 584, 596 (1874); BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, APPELLATE PROCEDURE AND TRIAL PRACTICE INCIDENTAL TO APPEALS § 557 (1892)).

92. *Holt v. Quality Motor Sales, Inc.*, 776 N.E.2d 361, 367 n.6 (Ind. Ct. App. 2002); *In re Annexation Proposed by Ordinance No. X0195*, 774 N.E.2d 58, 67 n.6 (Ind. Ct. App. 2002); *Unger*

court's judgment,⁹³ putting the whole transcript in the appendix,⁹⁴ failure to include necessary documents in the appendix,⁹⁵ other appendix problems,⁹⁶ generally defective briefing,⁹⁷ asserting facts outside the record,⁹⁸ failing to number the pages of the appendix,⁹⁹ argumentative brief or statement of facts,¹⁰⁰ other problems with the statement of facts,¹⁰¹ improvident attacks on a court,¹⁰²

v. FFW Corp., 771 N.E.2d 1240, 1244 n.2 (Ind. Ct. App. 2002); Blackwell v. Dykes Funeral Homes, Inc., 771 N.E.2d 692, 697 n.2 (Ind. Ct. App. 2002); Crossman Communities, Inc. v. Dean, 767 N.E.2d 1035, 1044 (Ind. Ct. App. 2002); Bunch v. State, 760 N.E.2d 1163, 1167 n.3 (Ind. Ct. App.), *vacated on other grounds* 2002 WL 31656566 (Ind. 2002); Bradshaw v. State, 759 N.E.2d 271, 273 n.2 (Ind. Ct. App. 2001); Leslie v. State, 755 N.E.2d 1147, 1148 n.1 (Ind. Ct. App. 2001); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 593 n.6 (Ind. 2001).

93. Grabarczyk v. State, 772 N.E.2d 428, 430 n.2 (Ind. Ct. App. 2002); Carter v. KCOFC, 761 N.E.2d 431, 433 n.1 (Ind. Ct. App. 2001); SLR Plumbing & Sewer, Inc. v. Turk, 757 N.E.2d 193, 195 n.1 (Ind. Ct. App. 2001); Chaja v. Smith, 755 N.E.2d 611, 612 n.1 (Ind. Ct. App. 2001).

94. *In re D.J.*, 755 N.E.2d 679, 681 n.1 (Ind. Ct. App. 2001).

95. Jones v. State, 774 N.E.2d 957, 960 n.3 (Ind. Ct. App. 2002), *same case reported at* 775 N.E.2d 322 *and* 777 N.E.2d 1; Ingram v. State, 761 N.E.2d 883, 885 n.1 (Ind. Ct. App. 2002); Jaco v. State, 760 N.E.2d 176, 180 n.6 (Ind. Ct. App. 2001); L.M.A. v. M.L.A., 755 N.E.2d 1172, 1173-74 nn.2-4 (Ind. Ct. App. 2001).

96. Cox v. Town of Rome City, 764 N.E.2d 242, 245 n.1 (Ind. Ct. App. 2002).

97. Wright v. State, 772 N.E.2d 449, 453 n.1 (Ind. Ct. App. 2002); Nicholson v. State, 768 N.E.2d 1043, 1045-47 nn.2,3,6 (Ind. Ct. App. 2002); Fulk v. Allied Signal, Inc., 755 N.E.2d 1198, 1203-05 nn.4,6,9-10 (Ind. Ct. App. 2001).

98. Allstate Ins. Co. v. Hammond, 759 N.E.2d 1162, 1166 n.3 (Ind. Ct. App. 2001); Rothschild v. Devos, 757 N.E.2d 219, 221 n.2 (Ind. Ct. App. 2001); Bowling v. Poole, 756 N.E.2d 983, 987 n.3 (Ind. Ct. App. 2001).

99. Jones, 774 N.E.2d at 966 n.8, *same case reported at* 775 N.E.2d 322 *and* 777 N.E.2d 1; Murdock Construction Mgmt., Inc. v. Eastern Star Missionary Baptist Church, Inc., 766 N.E.2d 759, 761 n.1 (Ind. Ct. App. 2002); Blocher v. DeBartolo Properties Mgmt., Inc., 760 N.E.2d 229, 232 n.2 (Ind. Ct. App. 2001); South Haven Sewer Works, Inc. v. Jones, 757 N.E.2d 1041, 1043 n.1 (Ind. Ct. App. 2001).

100. Jones, 774 N.E.2d at 960 n.2, *same case reported at* 775 N.E.2d 322 *and* 777 N.E.2d 1; Montgomery v. Trisler, 771 N.E.2d 1234, 1239 (Ind. Ct. App. 2002); Scoleri v. Scoleri, 766 N.E.2d 1211, 1213 n.1 (Ind. Ct. App. 2002).

101. Martin v. Martin, 771 N.E.2d 650, 657 n.3 (Ind. Ct. App. 2002); Quigg Trucking v. Nagy, 770 N.E.2d 408, 413 (Ind. Ct. App. 2002); Oliver v. Pinnacle Homes, Inc., 769 N.E.2d 1188, 1190 n.1 (Ind. Ct. App. 2002); *In re Paternity of V.A.M.C.*, 768 N.E.2d 990, 991 n.1 (Ind. Ct. App. 2002); Craun v. State, 762 N.E.2d 230, 232 n.4 (Ind. Ct. App. 2002).

102. Reed Sign Services, Inc. v. Reid, 760 N.E.2d 1102, 1103 (Ind. Ct. App. 2001) (on rehearing); Kirk v. Kirk, 759 N.E.2d 265, 266 n.1 (Ind. Ct. App. 2001); Outlaw v. Erbrich Prods. Co., 758 N.E.2d 65, 67 n.2 (Ind. Ct. App. 2001).

name-calling,¹⁰³ "kitchen sink" advocacy,¹⁰⁴ misidentification of party status,¹⁰⁵ mischaracterization of evidence,¹⁰⁶ improper form on rehearing,¹⁰⁷ no argument headings,¹⁰⁸ failure to include the standard of review,¹⁰⁹ and lack of pinpoint citations.¹¹⁰

As reported last year, difficulties in properly presenting the statement of facts continue to be a leading problem in appellate briefs.¹¹¹ However, the more obscure problem of attempting to raise new issues in the reply brief made a strong bid for the most recurrent briefing error this past year, with nine admonitions in the reported cases.¹¹²

B. Unusual Cases

A few of the appellate opinions issued during the reporting period merited special recognition not for their teachings in the area of appellate procedure, but for other reasons, as noted below.

The Anti-Steve McQueen Award for Least Great Escape. While incarcerated in the Madison County Jail, the two defendants in *Nicholson v. State*¹¹³ tried to get an accomplice to smuggle a hacksaw blade to them, hidden within the pages of a religious magazine.¹¹⁴ Surprisingly, the plan didn't work and the two were convicted of attempted escape. No word on whether they'll try baking the blade into a cake next time.

The Palsgraf Award for Most Attenuated Causation. The plaintiff in *Johnston v. O'Bannon*¹¹⁵ was injured when she fell off her motor scooter. She sued the Governor and various state officials. Her theory was that the state wrongfully denied her application for a motor vehicle plate

103. *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 n.8 (Ind. Ct. App. 2002). *But see* 764 N.E.2d at 669 (Sullivan, J. dissenting).

104. *Martin v. State*, 760 N.E.2d 597, 601 n.3 (Ind. 2001).

105. *Martinez v. Belmonte*, 765 N.E.2d 180, 185 n.6 (Ind. Ct. App. 2002).

106. *Baxter v. State*, 774 N.E.2d 1037, 1043 n.4 (Ind. Ct. App. 2002); *Stewart v. State*, 768 N.E.2d 433, 435 n.1 (Ind. 2002); *Mortgage Credit Services, Inc. v. Equifax Credit Info. Services, Inc.*, 766 N.E.2d 810, 811 n.1 (Ind. Ct. App. 2002).

107. *Farm Bureau Ins. Co. v. Allstate Ins. Co.*, 770 N.E.2d 859, 860 n.1 (Ind. Ct. App. 2002) (on rehearing).

108. *Schwartz v. Schwartz*, 773 N.E.2d 348, 352 n.5 (Ind. Ct. App. 2002).

109. *In re Paternity of Baby W.*, 774 N.E.2d 570, 575 n.2 (Ind. Ct. App. 2002).

110. *Cox v. State*, 774 N.E.2d 1025, 1028 n.2 (Ind. Ct. App. 2002); *Reed Sign Serv., Inc. v. Reid*, 755 N.E.2d 690, 695 n.4 (Ind. Ct. App. 2001).

111. *See Cressler*, *supra* note 2, at 1151.

112. *See supra* note 92.

113. 768 N.E.2d 1043 (Ind. Ct. App. 2002).

114. *Id.* at 1045-46.

115. 768 N.E.2d 510 (Ind. Ct. App. 2002).

simply because she refused to present proper identification. As a result of being unable to license her vehicle, she was forced to ride a motor scooter, thus “causing” her accident and the resulting injuries.¹¹⁶

The Ogden Nash Award for Most Meaningful Brevity. The *Estate of Hamblen v. Jewell*¹¹⁷ involved two daughters contesting the will(s) of their deceased father. In seventy-four words, the court of appeals summarized a procedural history that involved two trial courts, three different trial judges, two separate appeals, an original action, and countless and repetitive motions.¹¹⁸ The summary was then punctuated with one word: “ENOUGH!”¹¹⁹ Indeed.

The Hangover Award for Most Severe Party After-Effect. At the invitation of a friend, the defendants in *Dominiack Mechanical, Inc. v. Dunbar*¹²⁰ attended a catered party in a skybox at a Chicago Bulls game. Unfortunately, the party was paid for by funds their friend had embezzled. There was no allegation that party guests were in any way implicit in the embezzlement scheme.¹²¹ Nevertheless, the defrauded company sued the party-goers, asking that each person be required to pay a *pro rata* share of the cost of the party, about \$1100 each.¹²²

C. Miscellaneous Matters of Note

The new jurisdictional rule that began being phased in on January 1, 2001, gave the Indiana Supreme Court almost complete discretionary control over its docket.¹²³ The change allowed the court to take on more civil cases and the early indications are that the court has followed through. During the fiscal year ending June 30, 2001, the high court issued thirty-eight opinions where jurisdiction had arisen from the granting of a petition to transfer in a civil or tax case.¹²⁴ In the year ending June 30, 2002, that number rose to sixty.¹²⁵ Only in 1992, when the court issued sixty-two civil opinions, has that number been surpassed during a twelve-month period.¹²⁶

The high court has also displayed a substantially increased interest in oral argument. In recent years, the court has been able to average about twenty-four

116. *Id.* at 511.

117. 772 N.E.2d 1003 (Ind. Ct. App. 2002).

118. *Id.* at 1004 (beginning “In the seventeen months . . .” and ending “wills is valid”).

119. *Id.*

120. 757 N.E.2d 186 (Ind. Ct. App. 2001).

121. *Id.* at 191.

122. *Id.* at 187.

123. See Cressler, *supra* note 2, at 1152-53.

124. See INDIANA SUPREME COURT, 2001 ANNUAL REPORT, at A-2 (2001).

125. See INDIANA SUPREME COURT, 2002 ANNUAL REPORT, at A-3 (2002).

126. See SUPREME COURT OF INDIANA PROGRESS REPORT 1992, at 2 (1993).

oral arguments per year. The court had already conducted twenty-seven arguments during the three-month period between September 19 and December 19, 2002.¹²⁷

During the preceding year, thousands of attorneys, students, and citizens have watched all or part of an oral argument on their computers through the Indiana Supreme Court's website with its "Oral Arguments Online" and "Courts In the Classroom" feature.¹²⁸

The Indiana Court of Appeals continued its remarkable record for efficiency and output. Measuring from the date an appeal is fully briefed and transmitted for opinion, the average age of the cases in the offices of the judges of the appellate court is about forty-two days.¹²⁹ During 2001, the fifteen judges on the Indiana Court of Appeals averaged 125 majority opinions per judge, and the senior judges added another 128 opinions to the court's majority opinion total of 2003 for the year.¹³⁰

The court of appeals reversed the trial court's judgment about 15% of the time in criminal cases and around 35% of the time in civil cases.¹³¹ Approximately 28% of its opinions are published.¹³²

CONCLUSION

The Indiana Court of Appeals issues its opinions in a remarkably timely manner. The likelihood of getting a civil appeal heard by the Indiana Supreme Court has never been better and the prospects look good for continued attention to the jurisdictional transfer process. In addition, thanks to technology and a far-sighted state high court, unprecedented public access to the appellate system has been made available. Finally, the merit system of appellate judge selection in place in Indiana since 1970 has created an appellate judiciary composed of remarkably well-qualified and dedicated individuals. In short, Indiana is a great place to practice appellate law.

The rewritten Rules of Appellate Procedure also contribute significantly to making Indiana appeal-friendly. These rules provide the most complete procedural roadmap to handling an appeal that has ever been available in the Indiana state court system. The rules appear to be working well as they have settled into everyday use. Perhaps the time has come to say that the modern Rules of Appellate Procedure are officially no longer new.

127. Statistics on file with the Division of Supreme Court Administration.

128. *Id.*; see also Cressler, *supra* note 2 at 1154.

129. See INDIANA COURT OF APPEALS, 2001 ANNUAL REPORT 1 (2002).

130. *Id.* at 2.

131. *Id.* at 1.

132. *Id.* at 4.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

JOHN R. MALEY*

Indiana civil practitioners experienced a broad range of important developments during the survey period. The most notable change was the implementation of new Indiana Jury Rules, which took effect January 1, 2003, and which drastically change procedures relating to jury trials in Indiana. Other recent amendments to the Indiana Trial Rules and Indiana Rules of Appellate Procedure changed and improved specific areas of Indiana civil practice. Meanwhile, the Indiana Supreme Court issued a significant opinion modifying the legal test for determining when a mixed equitable/legal claim is to be tried to a jury. To assist Indiana practitioners, this Article outlines these key changes.

I. THE INDIANA JURY RULES

The enactment of the new Indiana Jury Rules is the most significant development in Indiana trial practice in recent years. Historically, only a few Indiana Trial Rules spoke to the selection and administration of juries.¹ Otherwise, the procedures for juries were either scattered among various appellate decisions,² several statutes,³ or left to the trial judge without any appellate or rule-based guidance.

To provide more guidance and improve the process for juries, the Indiana Jury Rules were adopted December 21, 2001, and took effect January 1, 2003.⁴ The Jury Rules were the product of a

four-year effort involving public hearings, written recommendations, public comment, and revisions, conducted by the members of the Citizens Commission on the Future of Indiana's Courts, by the judges who serve on the Judicial Administration Committee of the Judicial Conference, and by the Supreme Court Committee on Rules of Practice

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1. See, e.g., IND. TRIAL R. 47 (addressing number of jurors, peremptory challenges, and voir dire); IND. TRIAL R. 48 (majority verdicts); IND. TRIAL R. 49 (abolishing special verdicts and interrogatories to the jury).

2. See, e.g., *Rogers v. R.J. Reynolds Tobacco Co.*, 731 N.E.2d 36, 40 (Ind. Ct. App. 2000) (addressing trial judge's handling of question from juror whether jury could hold press conference after the verdict), *trans. granted, vacated*, 753 N.E.2d 5 (Ind. 2001).

3. See, e.g., IND. CODE § 34-36-1-6 (1998) (procedure for handling jury question regarding evidence or point of law).

4. *Order of Indiana Supreme Court Adopting Jury Rules* (Dec. 21, 2001), available at <http://www.state.in.us/judiciary/research/amend02/jury.pdf>; *Tincher v. Davidson*, 762 N.E.2d 1221, 1224 n.2 (Ind. 2002). The Indiana Jury Rules were amended July 19, 2002, prior to their effective date. *Order Of Indiana Supreme Court Amending Jury Rules* (July 19, 2002), available at <http://www.state.in.us/judiciary/rules/amend/july02/jury.pdf>.

and Procedure.⁵

Indiana's new Jury Rules "provide explicit guidance and directives to our trial judges and legal counsel so that the jurors might become better educated in the various aspects of our legal system generally, as well as the specific case for which they sit."⁶

The Jury Rules consist of thirty separate rules addressing topics ranging from the composition of the jury pool⁷ to procedures for assisting jurors during deliberations.⁸ Many of the new rules are unremarkable, but several will significantly impact Indiana jury practice.

For instance, Jury Rule 2 requires that the jury pool for each county shall be compiled annually. Further, that rule requires that the jury pool shall be compiled from voter's registration lists for the county, supplemented "with names from at least one other list of persons resident in the county, such as lists of utility customers, property taxpayers, persons filing income tax returns, motor vehicle registrations, city directories, telephone directories, and driver's licenses."⁹ This procedure should significantly enhance the number of individuals in, and the diversity of, the jury pool in Indiana counties, as previously only voter's registration lists were used in most counties for jury pools. Indeed, Marion County has not yet implemented Jury Rule 2 and still uses only voter's registration lists.¹⁰

Jury Rule 11 mandates that trial courts "shall provide prospective jurors with orientation prior to the selection process so they may understand their role in our legal system."¹¹ Jury Rule 14 specifies what the jury panel of prospective jurors must be told at the outset of the case, which must at least include nine items ranging from the nature of the case,¹² the applicable burdens of proof,¹³ and the "appropriate means by which jurors may address their private concerns to the judge."¹⁴

Most significantly, Jury Rule 14 adds a new concept of mini-opening statements to Indiana trials, providing, "[t]he facilitate the jury panel's understanding of the case, with the court's consent the parties may present brief statements of the facts and issues (mini opening statements) to be determined by the jury."¹⁵ This use of mini opening statements is an entirely new concept in

5. *Tincher*, 762 N.E.2d at 1224.

6. *Hall v. Eastland Mall*, 769 N.E.2d 198, 204 (Ind. Ct. App. 2002).

7. IND. JURY R. 2.

8. IND. JURY R. 28.

9. IND. JURY R. 2.

10. See *Jury Pool Information*, at <http://www.indygov.org/courts/jurypool/index.htm#1>, at No. 6 ("Voter's Registration is the source from which prospective jurors' names are selected").

11. IND. JURY R. 11.

12. IND. JURY R. 14(a)(2).

13. IND. JURY R. 14(a)(4).

14. IND. JURY R. 14(a)(6).

15. IND. JURY R. 14(b).

Indiana practice, and certainly could allow for more meaningful voir dire with the issues more meaningfully previewed by trial counsel. Practitioners will need to add the possibility of mini opening statements to their punch list of trial preparation subjects.

Jury Rule 17 speaks to challenges to prospective jurors for cause, and includes a provision that the court shall sustain a challenge for cause if the prospective juror served as a juror in a case that resulted in a verdict in that same county within the previous 365 days.¹⁶ For trial lawyers seeking to exclude a prospective juror not of their liking, this for cause provision could save a peremptory challenge.

Several of the new rules seek to enhance the information available to jurors during deliberation. For instance, Jury Rule 23 provides that the court may authorize the use of juror trial books to aid jurors, and that such books may contain “(a) all given instructions . . . (c) witness lists; and (d) copies of exhibits admitted for trial.”¹⁷ Jury Rule 26 requires the court to read the final instructions, and to provide each juror with written instructions *before* the court reads them.¹⁸ Significantly, this new rule requires that jurors “shall retain the written instructions during deliberations.”¹⁹ This requirement is a significant change in Indiana practice.

Jury Rule 27 addresses final arguments, and has a unique provision mandating that if the party opening and closing final argument (e.g., the plaintiff with final argument and then rebuttal argument) raises a new point or fact in its closing final argument (e.g., rebuttal), then the adverse party has the right to reply to the new point or fact.²⁰ Plaintiffs and prosecutors will need to be careful to avoid opening the door to this sur-rebuttal argument, and defense counsel will need to be vigilant to taking advantage of this new opportunity.

Finally, the most significant and controversial provision of the Indiana Jury Rules is Jury Rule 28, which addresses how to assist juries at an impasse. This new rule provides:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the juror’s response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.²¹

Notably, the Indiana Supreme Court’s Committee on Rules of Practice and Procedure unanimously opposed this rule.²² In addition, two members of the

16. IND. JURY R. 17(a)(2).

17. IND. JURY R. 23.

18. IND. JURY R. 26.

19. *Id.*

20. IND. JURY R. 27.

21. IND. JURY R. 28.

22. *Tincher v. Davidson*, 762 N.E.2d 1221, 1226-27 (Ind. 2002) (Sullivan, J., concurring).

Indiana Supreme Court—Justices Sullivan and Rucker—dissented from the enactment of Jury Rule 28.²³

Justice Sullivan explained his reasons for his dissent in a 2002 opinion in which the Indiana Supreme Court applied the concepts of Jury Rule 28 even though it was not yet effective. Justice Sullivan explained:

I write to express my opposition to the majority's "urg[ing]" trial court judges "to facilitate and assist jurors in the deliberative process, in order to avoid mistrials." I do not think it proper, advisable, or (perhaps) constitutional for judges to "facilitate and assist" in jury deliberations absent the consent of the parties.

I acknowledge that the majority's view reflects the spirit of our new Jury Rule 28. As the majority's opinion reflects, Jury Rule 28 (adopted over Justice Rucker's and my dissent and over the contrary unanimous recommendation of our Supreme Court Committee on Rules of Practice and Procedure) is grounded in a goal of improved efficiency—and a desire to avoid mistrials. Certainly we should strive for improved efficiency. But I believe that the prejudice to the parties and our system of trial by jury, by allowing—indeed "urg[ing]"—judges "to facilitate and assist" in jury deliberations outweighs any benefits of improved efficiency in this regard.²⁴

It remains to be seen whether trial judges will be receptive to the *Tincher* majority's support of Jury Rule 28, or instead more cautious because of Justice Sullivan's concerns. One thing seems certain, however: if a trial judge assists the jury in its deliberative process in a manner not agreed to by the losing party, constitutional arguments will be presented on appeal, and at least two members of the Indiana Supreme Court are apt to be receptive to considering those arguments when considering a transfer petition on this issue..

In sum, the Indiana Jury Rules are unique and significant. Judge Baker's positive comments on these new rules in a 2002 Indiana Court of Appeals decision provide a good closing to this subject:

Hopefully, these new rules will aid in educating the jurors and will promote a better understanding of their vital role within our legal system. Additionally, Hoosier jurors may very well be provided with an opportunity to reconnect with their fellow citizens and their government. Moreover, the application of the rules may communicate to jurors that their time is valued.

The jury rules may also ward off those instances of inattention and frustration that often occur in a jury trial setting. Put another way, the

23. Order of Indiana Supreme Court Adopting Jury Rules (July 21, 2001), *available at* <http://www.state.in.us/judiciary/research/amend02/jury.pdf>; *Tincher*, 762 N.E.2d at 1220-27 (Sullivan, J., concurring).

24. *Tincher*, 762 N.E.2d at 1226-27 (Sullivan, J., concurring).

recent “overhaul” of the manner in which juries receive information and are treated by counsel and the courts alike, may prevent some incidents from occurring like those at this trial.²⁵

II. AMENDMENTS TO INDIANA TRIAL RULES

Several amendments were made to the Indiana Trial Rules during the survey period. For instance, Trial Rule 4.4(A)—Indiana’s long-arm statute—was amended to include new language after the list of eight examples of situations that give rise to personal jurisdiction. Specifically, since July of 2002, Trial Rule 4.4(A) now contains the following additional provision, “[i]n addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.”²⁶ This new language resolves any doubt that the Indiana long-arm statute extends to the full reach of due process. Some recent Indiana authority had cast significant doubt on that question.²⁷

Separately, in December 2001, Trial Rule 3 was amended to add to and clarify what is required for the commencement of an action. The new rule provides:

A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.²⁸

This amendment added the filing fee and service requirements, which previously were not in the text of Trial Rule 3. Nonetheless, in 1993, the Indiana Supreme Court had ruled, at least in the small claims context, that payment of the filing fee was required to commence an action.²⁹ Thereafter the issue had been unsettled enough to draw debate and a dissent within a court of appeals

25. *Hall v. Eastland Mall*, 769 N.E.2d 198, 205 (Ind. Ct. App. 2002).

26. IND. TRIAL R. 4.4(A).

27. *See, e.g., Anthem Ins. Cos. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227 (Ind. 2000).

If the Indiana long-arm statute were intended to be coextensive with the limits of personal jurisdiction under the Due Process Clause, it could be written with general language, such as the “any constitutional basis” statutes used in several other states. Most courts with “enumerated act” statutes, and indeed the correct approach under Indiana Trial Rule 4.4(A) is to, engage in a two-step analysis, first determining whether the conduct falls under the long-arm statute and then whether it comports with the Due Process Clause as interpreted by the United States Supreme Court and courts in this state.

Id. at 1232.

28. IND. TRIAL R. 3.

29. *Boostrom v. Bach*, 622 N.E.2d 175 (Ind. 1993).

decision.³⁰ With the amendment, there is no longer any uncertainty on the issue. To start an action, the complaint must be filed, the filing fee must be paid (or waived), and summons and complaint must be provided to the clerk for service.

Also in December 2001, a helpful amendment was made to Trial Rule 5(E) to allow a new fifth means of filing in court. Specifically, Trial Rule 5(E)(4) now allows filing to be effected by "any third-party commercial carrier for delivery to the clerk within three (3) calendar days, cost prepaid, properly addressed."³¹ Thus, parties can now send filings to the court by commercial carriers such as Federal Express and have the filing dated as of the date of submission, not the date of receipt.

III. AMENDMENTS TO INDIANA RULES OF APPELLATE PROCEDURE

The most significant recent amendment to the Indiana Rules of Appellate Procedure is the addition of Indiana Appellate Rule 46(H), providing for an Addendum to briefs. The Addendum is different from the required appendix, and indeed pursuant to Appellate Rule 46(H) "is not recommended in most cases."³² The Addendum "is a highly selective compilation of materials filed with a party's brief at the option of the submitting party."³³ The Addendum may not exceed fifty pages, may not contain argument, and

may include, for example, copies of key documents from the Clerk's Record or Appendix (such as contracts), or exhibits (such as photographs or maps), or copies of critically important pages of testimony . . . , or full text copies of statutes, rules, regulations, etc. that would be helpful to the Court on Appeal but which, for whatever reason, cannot be conveniently or fully reproduced in the body of the brief.³⁴

The Addendum can be a very useful tool for getting critical evidentiary information before the reviewing court. Indeed, while only one copy of the Appendix is filed, an original plus eight copies of an Addendum must be filed.³⁵ This allows each of the three judges and their law clerks to have a copy of the Addendum.

IV. JURY TRIALS

The most significant procedural decision during the survey period was issued in *Songer v. Civitas Bank*,³⁶ in which the Indiana Supreme Court addressed when a mixed equitable/legal case is triable to a jury. The case had been tried to the

30. *Fort Wayne Int'l Airport v. Wilburn*, 723 N.E.2d 967 (Ind. Ct. App. 2000).

31. IND. TRIAL R. 5(E)(4).

32. IND. APP. R. 46(H).

33. *Id.*

34. *Id.*

35. *Id.*

36. 771 N.E.2d 61 (Ind. 2002).

court, and on appeal the appellant contended that he was entitled to a jury trial.³⁷ In a thorough discussion of this constitutional issue, the Indiana Supreme Court affirmed the trial court, and in so doing expounded on the proper legal standard:

If the essential features of a suit as a whole are equitable and the individual causes of action are not distinct or severable, the entitlement to a jury trial is extinguished. The opposite is also true. If a single cause of action in a multi-count complaint is plainly equitable and the other causes of action assert purely legal claims that are sufficiently distinct and severable, Trial Rule 38(A) requires a jury trial on the legal claims. A review of Rule 38(A) and more than 120 years of decisions reveals that *Songer* is correct in arguing that the simple inclusion of an equitable claim, standing alone, does not warrant drawing an entire case into equity. Such an approach violates Rule 38(A), and we disapprove cases holding otherwise. Something more than the mere presence of an equitable claim is necessary.³⁸

The *Songer* court then concluded that the “appropriate question is whether the essential features of the suit are equitable.”³⁹ To determine if equity takes jurisdiction of the essential features of a suit, the court held that “we evaluate the nature of the underlying substantive claim and look beyond both the label a party affixes to the action and the subsidiary issues that may arise within such claims.”⁴⁰ The court concluded “[c]ourts must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded. In the appropriate case, the issues arising out of discovery may also be important.”⁴¹

The *Songer* decision implicitly acknowledges that the analysis is case sensitive. But *Songer* does provide a refined and clearer statement of the rule of law to be applied.

CONCLUSION

These represent, to the author, the most significant developments in Indiana civil procedure during the survey period. Overall the developments are helpful to practitioners and should enhance Indiana civil practice.

37. *Id.* at 63.

38. *Id.* at 68.

39. *Id.*

40. *Id.*

41. *Id.*

INDIANA CONSTITUTIONAL DEVELOPMENTS: THE WIND SHIFTS

JON LARAMORE*

The modern era in Indiana constitutional law began in 1989, when Chief Justice Shepard published "Second Wind for the Indiana Bill of Rights" in this law review.¹ His invitation to revivify Indiana constitutional law has been taken to heart by the bar and many of the chief justice's judicial colleagues. But progress over the fourteen years since the article was published has not followed the pattern the chief justice forecast.

New individual rights—beyond those guaranteed by the U.S. Constitution—have not been the primary product of the last fifteen years of state constitutional development.² Although much litigation has addressed article I of the Indiana Constitution, the portion of the constitution covering individual rights, the Indiana Supreme Court has expanded individual rights beyond the federal standard in only a few cases. Rather, the most significant Indiana constitutional decisions have come from articles III through X, the provisions dealing with separation of powers, the responsibilities of the branches of government, and state institutions and finance.³ Indiana's appellate courts *have* brought new attention to the Indiana Constitution, but the largest impact on everyday Hoosiers has not come from decisions applying article I.

I. THE FADING PROMISE OF NEW INDIVIDUAL RIGHTS

A. *The Starting Point*

In his 1989 article, the chief justice reviewed the history of Indiana's Bill of Rights, which was the primary source of individual rights protections before provisions of the Federal Constitution were applied to state action.⁴ He discussed the earliest history, when Indiana's courts declined to enforce fugitive slave laws.⁵ He noted *Callender v. State*,⁶ Indiana's adoption of the exclusionary rule

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1. Hon. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. *See infra* Part I.B-C.

3. *See infra* notes 246-56 and accompanying text.

4. Shepard, *supra* note 1, at 576-85.

5. *Id.* at 576-77 (citing *State v. Laselle*, 1 Blackf. 60 (Ind. 1820)). More recent scholarship reveals a less savory history between Indiana's legal system and African-Americans. The 1851 constitution contained provisions excluding Negroes from the state altogether, and legislatures in the 1850s created and supported the State Board of Colonization, designed to encourage Negroes to emigrate to Africa. *See* John Martin Smith, *Bondage, Banishment, and Deportation of Indiana Negroes* (paper delivered at 81st Annual Historical Conference of the Indiana Historical Society,

in criminal cases thirty-nine years before its adoption by the United States Supreme Court.⁷ He concluded, however, that active development of federal constitutional law relating to individual rights in the 1960s and 1970s reduced the need to rely on state constitutions, resulting in fewer decisions applying the Indiana Constitution.⁸

Chief Justice Shepard noted that the Indiana Constitution contains several provisions without federal analogues, including more expansive language relating to free expression and religious freedom.⁹ Other unique provisions include “guarantees that all courts shall be open and that every person shall have a remedy,”¹⁰ provisions guaranteeing bail, the provision “that the citizens on a criminal jury shall determine for themselves both the facts and the law of the case,”¹¹ and the guarantee of proportional penalties in criminal cases.¹²

Chief Justice Shepard said that “[t]hese and other sections clearly provide occasions when a litigant who would lose in federal court may win in state court.”¹³ He invited lawyers to participate in development of new law under the Indiana Constitution by identifying and vigorously arguing state constitutional issues.¹⁴ He closed the article by specifically identifying “horizontal” separation of powers under federalism—dividing judicial power between independent state and federal judiciaries—as a guaranty of personal liberty.¹⁵ He concluded that “[t]he protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people.”¹⁶

B. Subsequent Developments

Since the chief justice’s article, there has been only marginal change—not a revolution—in individual rights jurisprudence under the Indiana Constitution.¹⁷

2001).

6. 138 N.E. 817 (1923).

7. The exclusionary rule was adopted as a matter of federal constitutional law in *Mapp v. Ohio*, 367 U.S. 643 (1961).

8. Shepard, *supra* note 1, at 580.

9. *Id.* at 580-81 (citing IND. CONST. art. 1, §§ 2-9).

10. *Id.* at 581.

11. *Id.* at 582.

12. *Id.* at 583.

13. *Id.*

14. *Id.* at 584-85.

15. *Id.* at 586.

16. *Id.*

17. Because this article focuses primarily on cases decided during the past year, the discussion of developments in individual rights litigation under the Indiana Constitution between 1989 and 2001 is necessarily brief. For a more developed account, see the relevant materials from those years in the case compilation *Indiana Constitutional Law* (Jon Laramore & Janice E. Kreuscher, eds. 2003). See also Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69

The case that ushered in the modern era of individual rights litigation under the Indiana Constitution, *Price v. State*, set out a bold framework.¹⁸ The decision invalidated the conviction of a woman charged with disorderly conduct for her loud objections to police tactics in arresting her friend, finding that the conviction could not withstand analysis under the Indiana Constitution although it was valid under federal law.¹⁹ "Political speech," the court said, was a "core value" under the Indiana Constitution that could not be diminished.²⁰ But there has been little further development of the "core value" of "political speech," and as of now it appears to protect only the right to vehemently protest police action.

Developments in other areas of state constitutional law were less bold. In *Moran v. State*, the court applied article I, section 11, the state search and seizure clause, to a search of garbage that the defendant had placed at the roadside for pickup.²¹ Like the United States Supreme Court, the Indiana Supreme Court concluded that a roadside garbage search was not prohibited, although it applied a slightly different standard to reach the same result.²² Although *Brown v. State*²³ forcefully articulated the warrant requirement under the Indiana Constitution in invalidating a search, the court indicated that the outcome would have been the same under the Fourth Amendment analysis. More recently, in *City Chapel Evangelical Free Church, Inc. v. City of South Bend*, the court found a right to corporate worship in sections 2 and 3 of article I, but did not break significant new ground in religious freedom.²⁴

The instances in which individuals' freedoms under the Indiana Constitution extend beyond those guaranteed by federal law remain few and far between. For example, none of the provisions of the Indiana Constitution that Chief Justice Shepard identified as having no federal counterpart has been the source of significant new rights.²⁵ Of those that have been litigated, the "open courts" and "right to a remedy" provisions in article I, section 12 recently have been held not to prevent legislative abolition of causes of action or to impede application of statutes of limitation and other procedural limitations.²⁶ The right of a criminal

IND. L.J. 849 (1994).

18. 622 N.E.2d 954 (Ind. 1993).

19. Compare *id.* 960-65 (Indiana analysis), with *id.* at 965-67 (federal analysis).

20. *Id.* at 961-64.

21. 644 N.E.2d 536 (Ind. 1994).

22. Compare *id.* at 541 (analyzing only the reasonableness of law enforcement conduct) with, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (analyzing objective reasonableness of expectation of privacy in roadside garbage).

23. 653 N.E.2d 77 (Ind. 1995).

24. 744 N.E.2d 443, 450-51 (Ind. 2001). The subject matter of the dispute in *City Chapel* was whether the city would violate the church's constitutional rights by taking its downtown property through eminent domain. The only holding in the case, by a 3-2 margin, was that the church was entitled to a trial to show that taking its specific property would harm the "core value" of religious exercise. *Id.* at 451.

25. Shepard, *supra* note 1, at 580.

26. See, e.g., *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000).

jury to "determine the law and the facts" under article I, section 19, recently has been interpreted to mean that the jury should follow the judge's instructions²⁷ (although it prohibits certain kinds of mandatory instructions²⁸). Also, although Indiana's "equal privileges and immunities" language has been held to have a different meaning from the Federal Equal Protection Clause, the linguistic difference has not led to significantly different outcomes, and the Indiana standard may be less restrictive of legislative classification than the federal rule.²⁹

C. Recent Developments

Individual rights decisions under the Indiana Constitution in the most recent year continued the pattern of only marginal differences in outcomes under federal and state standards. In two search and seizure cases, the Indiana Supreme Court aligned itself with federal law, in one case with almost eerie prescience.³⁰ The Indiana Court of Appeals marginally expanded the reach of free expression rights under the Indiana Constitution.³¹ And the reach of Indiana's constitutional double jeopardy protection—which once had the possibility of being significantly broader than its federal analogue—fell into line with the federal rule.³²

The most awaited individual rights decisions of the Indiana Supreme Court's last year both presented search-and-seizure issues under article I, section 11. *Gerschoffer v. State* addressed police roadblocks set up for the purpose of interdicting drunk drivers. *Linke v. Northwestern School Corp.* addressed mandatory student drug testing in public schools. The supreme court decisions were much anticipated because, in each case, the Indiana Court of Appeals had

27. *Fuquay v. State*, 583 N.E.2d 1154 (Ind. Ct. App. 1991). In a law review article, Justice Rucker has taken issue with this interpretation, arguing that the historical evidence supports the view that article I, section 19 permits jury nullification. Hon. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999). The Indiana Supreme Court has granted transfer in *Meeks v. State*, 759 N.E.2d 1126 (Ind. Ct. App. 2001), *trans. granted*, 774 N.E.2d 509 (Ind. 2002), to address this issue.

28. *See, e.g., Parker v. State*, 698 N.E.2d 737 (Ind. 1998) (permitting jury to decline to find habitual offender status even if it finds all necessary predicate facts); *Seay v. State*, 698 N.E.2d 732 (Ind. 1998) (same).

29. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994) ("the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes . . . [and] the preferential treatment must be uniformly applicable and equally available to all persons similarly situated"). No statute has been invalidated under this standard since it was announced in 1994. *See, e.g., Lake County Clerk's Office v. Smith*, 766 N.E.2d 707 (Ind. 2002) (upholding bail statute against challenge under article I, section 23).

30. *Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002), both discussed *infra* in Part I.C.1-2.

31. *Mishler v. MAC Sys., Inc.*, 771 N.E.2d 92 (Ind. Ct. App. 2002).

32. *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002).

ruled that article I, section 11 forbade suspicionless searches.³³ The court of appeals ruled that both kinds of searches—automobile stops and drug tests—could take place only if the authorities had reasonable suspicion that the individual being searched had committed a driving offense or had used illegal drugs.³⁴

1. *Drunk Driving Roadblocks*.—In its *Gerschoffer* opinion, the Indiana Court of Appeals had broken new ground in analysis under article I, section 11.³⁵ The court examined a drunk-driving roadblock (also called a “sobriety checkpoint”) that appeared to satisfy Fourth Amendment standards because it was set up pursuant to a neutral plan, minimized police discretion in determining which cars to stop, and otherwise hewed to the Fourth Amendment standards set forth in *Michigan Department of State Police v. Sitz*.³⁶

The Indiana Court of Appeals applied article I, section 11 to drunk-driving roadblocks using the test enunciated by the Indiana Supreme Court to determine the independent meaning of provisions of the Indiana Constitution: “Questions arising under the Indiana Constitution should be resolved by ‘examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.’”³⁷ The court concluded that this standard dictated that “the intent of the framers is paramount in determining the meaning

33. *State v. Gerschoffer*, 738 N.E.2d 713 (Ind. Ct. App. 2000), *vacated by* 753 N.E.2d 6 (Ind. 2001); *Linke v. Northwestern Sch. Corp.*, 734 N.E.2d 252 (Ind. Ct. App. 2000), *vacated by* 763 N.E.2d 972 (Ind. 2002).

34. *Gerschoffer*, 738 N.E.2d at 723; *Linke*, 734 N.E.2d at 259.

35. 738 N.E.2d 713.

36. 496 U.S. 444 (1990); *see also* *State v. Garcia*, 500 N.E.2d 158 (Ind.), *cert. denied*, 481 U.S. 1014 (1986) (earlier Fourth Amendment analysis of sobriety checkpoints).

37. *Gerschoffer*, 738 N.E.2d at 720 (quoting *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 298 (Ind. 1994)). More recently, the Indiana Supreme Court provided an even fuller statement of the standard for deriving the independent significance of provisions of the Indiana Constitution:

Our methodology for interpreting and applying provisions of the Indiana Constitution is well established. It requires: a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the constitution, we look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy. The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.

City Chapel Evangelical Free Church, Inc. v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001) (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 986) (Ind. 2000) (internal quotation marks and indentation omitted).

of a provision"³⁸ The court noted that the Indiana Supreme Court's cases interpreted the populist, Jacksonian roots of the Indiana Constitution to focus search and seizure analysis on the reasonableness of police conduct.³⁹

With this prelude, the court of appeals concluded that "Section 11 requires probable cause or, at a minimum, individualized suspicion of criminal activity before the police may stop a motorist, and that absent either, a stop constitutes an unreasonable seizure as proscribed by the Indiana Constitution."⁴⁰ In seeking to differentiate the Indiana Constitution's prohibition against unreasonable searches and seizures from its federal analogue, the court emphasized the populist distrust of government, the importance placed on privacy by the framers and by recent Indiana Supreme Court decisions, and the lack of Indiana constitutional precedent supporting warrantless searches and seizures.⁴¹ The opinion's analysis is animated by skepticism of governmental authority and the importance of individualized determination of responsibility (through probable cause or reasonable suspicion) before police intervention. The opinion concludes, "In Indiana, there is still a presumption that Hoosiers are law-abiding citizens. Under our state constitution, a motorist is free to travel Indiana's public highways without unreasonable interference from the government, and he is treated as a suspect only if his actions justify it."⁴²

The Indiana Supreme Court's take on the same facts was different. In a unanimous opinion determining the proper constitutional standard,⁴³ Chief Justice Shepard recited the same standard-of-review language that the court of appeals had used in its opinion.⁴⁴ But he rapidly concluded that historical evidence regarding any independent meaning of article I, section 11 was lacking.⁴⁵ He also noted previous case law holding that "Article 1, Section 11 must be liberally construed to protect Hoosiers from unreasonable police activity in private areas of their lives," leading to the principle that police conduct is judged on its reasonableness.⁴⁶

Then, based in part on studies showing that drunk-driving roadblocks can provide significant protection, the court announced an approach that balanced privacy rights under article I, section 11 against the importance of roadway safety. "A minimally intrusive roadblock designed and implemented on neutral criteria that safely and effectively targets a serious danger specific to vehicular

38. *Gerschoffer*, 738 N.E.2d at 720.

39. *Id.* at 721 (citing *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994)).

40. *Id.*

41. *Id.* at 722-26. The court of appeals relied particularly on *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1992), in which the Indiana Supreme Court had stated the necessity of reasonable suspicion before a highway stop would be proper.

42. *Id.* at 726 (footnote omitted).

43. Justice Dickson dissented in part, but only as to the application of the standard. *Gerschoffer*, 763 N.E.2d at 971 (Dickson, J., dissenting in part).

44. *Id.* at 965.

45. *Id.*

46. *Id.*

operation is constitutionally reasonable, unlike the random and purely discretionary stops we have disapproved.”⁴⁷ In support of its conclusion, the court also cited Professor Amar’s assertion that a broader search may sometimes be fairer and more reasonable than an individual search because the broader approach minimizes the potential for official arbitrariness and discrimination.⁴⁸ The court thus concluded that drunk-driving roadblocks are not per se forbidden by the Indiana Constitution.

The court went on to set forth a framework—which differs in scope and emphasis from the federal standard—by which lower courts may judge the constitutionality of drunk-driving roadblocks in future cases. The court’s review under the Indiana Constitution focused on the following factors:

- The roadblock should occur pursuant to a neutral plan “approved by appropriate officials.”⁴⁹
- The roadblock should be designed to effectuate its *road-safety related* purpose, so its timing and location must be keyed to road safety.⁵⁰
- Roadblock procedures should be designed to minimize law enforcement discretion, not only as to which cars are stopped but also as to all procedures used once the stops occur.⁵¹
- The roadblocks should minimize the intrusion on motorists’ time. Motorists also should have sufficient notice of the roadblocks so that they may avoid the roadblocks.⁵²
- Roadblocks should be administered safely.⁵³
- Roadblocks should be effective as measured by arrests for drunk driving.⁵⁴

These factors are to be balanced to determine whether the roadblock meets constitutional standards. The court gave no precise formula to judge whether a particular roadblock meets constitutional standards.

The court focused on several of the factors in ruling that the roadblock did not meet constitutional standards. First, the court noted that the roadblock did not seem to be designed especially to deter drunk driving. Rather, both its

47. *Id.* at 966. The opinion relied upon John H. Lacey et al., *Evaluation of Checkpoint Tennessee: Tennessee’s Statewide Sobriety Checkpoint Program*, Technical Report Prepared for U.S. Dep’t of Transp., Nat’l Highway Traffic Safety Admin. (Jan. 1999), <http://www.nhtsa.dot.gov/people/injury/research/ChkTenn/ChkptTN.html>.

48. *Gerschoffer*, 763 N.E.2d at 966 (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994)).

49. *Id.* at 967.

50. *Id.* at 967-68.

51. *Id.* at 968-69.

52. *Id.* at 969.

53. *Id.* at 970.

54. *Id.*

location and its timing appeared to be established for reasons of convenience.⁵⁵ Drunk driving had not been a particular problem at the location of the roadblock, and the timing appeared more oriented to general traffic flow issues than to expected arrests.⁵⁶ Second, although officers' discretion was controlled regarding which cars were to be stopped, there was little control over procedures used once the stops took place. "No standardized instructions were given to ensure that officers addressed drivers in a consistent manner,"⁵⁷ so motorists were not treated alike once they were stopped.

Third, and related to discretion, the court seemed especially troubled by the requirement that each motorist (or at least those motorists asked by officers) be required to produce a license and registration.⁵⁸ The court emphasized that drunk-driving roadblocks are permissible only as they relate to the particular dangers of drunk driving, so matters not directly related to drunk driving, such as lack of registration or unlicensed operation, could not be the target of a suspicionless search such as the roadblock at issue in this case.⁵⁹ "[T]he thought that an American can be compelled to 'show his papers' before exercising his right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals."⁶⁰

Fourth, and also related to the previously listed factor, the number of arrests undermined the constitutionality of the roadblock. The seventy stops that took place at the roadblock resulted in fourteen arrests and thirty-four warnings, but only two of the citations were for operating under the influence.⁶¹ The court concluded that this record undermined the assertion that the roadblock was appropriately targeted to get drunk drivers off the road and was instead "more like a generalized dragnet"⁶² Fifth, the court also noted that the average four-minute detention time appeared unduly long, making the roadblock appear unduly intrusive.⁶³ Because it was applying a balancing test, the court did not explain which of these factors led to the roadblock's invalidity, resting its decision on the totality of circumstances.

The result in *Gerschoffer* is that, contrary to the court of appeals' view, drunk driving roadblocks are valid under the Indiana Constitution just as they are under the Federal Constitution. The standards by which the roadblocks are judged, however, are somewhat different under the two constitutions, with Indiana applying a stricter standard.⁶⁴

The Indiana Supreme Court's decision in *Gerschoffer* applies the

55. *Id.* at 968.

56. *Id.*

57. *Id.*

58. *Id.* at 968.

59. *Id.*

60. *Id.* (quoting *State v. Kirk*, 493 A.2d 1271, 1285 (N.J. Super. Ct. App. Div. 1985)).

61. *Id.* at 970; see also IND. CODE § 9-30-5-2(1) (operating while intoxicated).

62. *Gerschoffer*, 763 N.E.2d at 968.

63. *Id.* at 969.

64. See *id.* at 963-65 (discussing federal roadblock jurisprudence).

constitutional standard of review more loosely than the court of appeals' opinion in the same case. The court of appeals rooted its decision in Indiana's historical antipathy to police discretion; its historic strict adherence to the warrant requirement; and the lack of case law departing from probable cause and reasonable suspicion standards.⁶⁵ Its opinion rested firmly on the portions of the standard of review relating to the historic roots of the constitutional provision at issue and cases interpreting the provision. The supreme court's opinion eschewed the historical approach because of the dearth of specific information about the intent of Indiana's framers when enacting article I, section 11.⁶⁶ It relied more heavily on federal case law, other states' cases, and statistical studies about roadblocks.⁶⁷ Moreover, the roadblock standards set in the supreme court's opinion also rely heavily on cases from other states and the federal system.⁶⁸ The supreme court's approach may suggest leeway in applying the standard of review in future cases.

2. *Random Drug Tests by Schools*.—The Indiana Supreme Court's other foray into search-and-seizure jurisprudence produced similar results, but this time by a narrow 3-2 margin. In *Linke v. Northwestern School Corp.*,⁶⁹ the court analyzed a "random drug testing program" for high school students. The drug testing program applied to all students in grades seven through twelve who participated in specified extra-curricular and co-curricular activities as well as students wishing to park their cars on campus.⁷⁰ The activities included athletics, academic teams, student government, musical performances, drama, Future Farmers of America, National Honor Society, and Students Against Drunk Driving.⁷¹ Students in those activities, and those wishing to park on campus, had to execute forms (also signed by parents) consenting to random drug tests.⁷²

If a student who had consented to testing was selected at random by a computer program, she was escorted across the school parking lot to a trailer, where a contractor operated the testing program.⁷³ The student was required to produce a urine sample in a private setting inside the trailer, and each specimen was tested by a private company for the substances banned by the school's policy. Any positive result was automatically re-tested. If the re-test also was positive, the result was communicated to school authorities. Students testing positive were required to meet with school authorities, and at that time could provide information that would explain the positive result, such as use of a

65. *State v. Gerschoffer*, 738 N.E.2d 713, 720-24 (Ind. Ct. App. 2000).

66. *Gerschoffer*, 763 N.E.2d at 965.

67. *Id.* at 964 (discussing federal cases); *id.* at 966 n.7 (discussing other states); *id.* at 966 (discussing statistical study).

68. *Id.* at 966-70.

69. 763 N.E.2d 972 (Ind. 2002).

70. *Id.* at 975.

71. *Id.*

72. *Id.*

73. The program is described in full at *id.* at 975-76.

prescription drug.⁷⁴

Absent a satisfactory explanation, a student testing positive could be banned from participating in the school activity covered by the drug policy for up to 365 days, although "the consequences vary based upon the activity and the substance."⁷⁵ Under some circumstances, a student could return to the activity after a negative re-test. At no time were test results made available to law enforcement authorities.

The court of appeals' opinion in *Linke* had provided a lengthy explication of federal cases that addressed school drug testing programs.⁷⁶ The court then quoted Indiana Supreme Court case law to the effect that article I, section 11 provides more protection than the Fourth Amendment, based in part on the framers' fear of "abuses of police power similar to those experienced in colonial times."⁷⁷ Motivated by historical fears of police power, the court concluded that precedents required individualized suspicion before a search, and found "no reason to depart from requiring individualized suspicion to protect against the abuses associated with blanket suspicionless searches of school children."⁷⁸

The Indiana Supreme Court, in a majority opinion by Justice Sullivan, began its analysis with the proposition that drug testing is a search, and as such must be "reasonable" to satisfy article I, section 11.⁷⁹ The court then rejected the court of appeals' view that the drug test had to be based on individualized reasonable suspicion.⁸⁰ The court rejected analogies linking the schools' conduct to law enforcement conduct because of the difference between police functions and the role of schools.⁸¹ Because the drug tests were not made available to law enforcement and were used solely for internal school purposes, the court concluded that the rationale for individualized suspicion is weaker than in a law enforcement setting, where criminal penalties could be at issue.⁸²

Noting that reasonableness in the context of article I, section 11 often depends upon "the totality of [the] circumstances," the court proposed not to apply a strict "reasonable suspicion" test, but instead to balance various factors to determine whether the drug tests are permitted by the Indiana Constitution.⁸³ The court explicitly "adopt[ed] the analytical approach of *Vernonia School District 475 v. Acton*,"⁸⁴ an earlier U.S. Supreme Court case that analyzed student drug testing, which required weighing "the nature of the privacy interest upon which the search intrudes, the character of the intrusion that is complained of,

74. *Id.* at 976.

75. *Id.* (the court provided no further explanation of how the consequences "vary").

76. *Linke v. Northwestern Sch. Corp.*, 734 N.E.2d 252, 254-58 (Ind. Ct. App. 2000).

77. *Id.* at 259.

78. *Id.*

79. *Linke*, 763 N.E.2d at 977.

80. *Id.* at 978.

81. *Id.*

82. *Id.* at 978-79.

83. *Id.* at 978 (quoting *Brown v. State*, 653 N.E.2d 77, 79-80 (Ind. 1995)).

84. *Id.* at 979 (adopting *Vernonia Sch. Dist. 475 v. Acton*, 515 U.S. 646 (1995)).

and the nature and immediacy of the governmental concern to determine whether the Policy is reasonable under the totality of these circumstances.”⁸⁵

The court looked first at the privacy interest, determining that students have a lesser interest than adults because they are minors and the schools stand in a quasi-parental relationship to the students.⁸⁶ The court also found that the students’ (and their parents’) consent vitiated their privacy interest.⁸⁷ To reach this conclusion, the court found that the consent was voluntary despite arguments that “it is necessary to participate in extracurricular activities to be successful in today’s world.”⁸⁸ Because the activities triggering the drug tests were voluntary in this case and did not affect students’ grades, the court concluded that the consents were essentially voluntary although “at least some adverse consequences may attach to the inability to . . . participate” in the activities.⁸⁹ The court also found that the fact that athletics already are a highly regulated activity, and students volunteering for athletics do so knowing that they will be subject to regulation, reduced the privacy interest of athletes subject to the drug testing policy.⁹⁰

Next, the court looked at the character of the intrusion. The court minimized the intrusive aspect of the testing procedure, noting that students are selected randomly, permitted to provide urine samples in private, and their identities are shielded from all participants in the testing process save a few top school administrators.⁹¹ The court also put considerable weight on the manner in which the tests were used. No punitive consequences befell students who tested positive other than exclusion from relevant school activities. Students were neither turned over to police (the court noted that earlier decisions used section 11 to protect Hoosiers only from “unreasonable *police* activity”⁹²) nor subjected to school discipline as a result of the tests.⁹³ The court therefore characterized the tests as “preventative and rehabilitative” rather than “punitive.”⁹⁴

Finally, the court looked at the school’s interest in drug testing. The court stated that the school’s concern stemmed from increased drug usage in the middle and high schools of Northwestern School Corporation in the mid-1990s, when one student died of a drug overdose.⁹⁵ The court concluded that “[d]eterring drug abuse by children in school is an important and legitimate

85. *Id.*

86. *Id.* at 979-80.

87. *Id.* at 980.

88. *Id.* (quoting *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo. 1998)).

89. *Id.*

90. *Id.* at 981.

91. *Id.* at 981-82.

92. *Id.* at 982 (quoting *Moran v. State*, 644 N.E.2d 536, 540 (Ind. 1994)) (emphasis supplied).

93. *Id.*

94. *Id.*

95. *Id.* at 983.

concern for our schools.”⁹⁶ It found the school’s interest increased by the fact that all activities triggering the drug-testing policy had off-campus components, such as athletic contests, performances, or other competitions.⁹⁷ The school legitimately could be concerned about physical injury to students during these off-campus forays, especially athletic events.⁹⁸ The court also noted that the school’s interest would be increased if the students at issue were role models for other students, but the school did not make that argument.⁹⁹

After reviewing these interests, the court concluded that “[i]n light of the totality of the circumstances, the Policy does not violate Section 11.”¹⁰⁰ In support of this conclusion, the court cited students’ decreased privacy interest; the schools’ “custodial and protective interest”; parental involvement in creating the program; existence of a comprehensive drug interdiction effort at the school, of which drug testing is only one part; and higher-than-average drug use at the school. It approved the program using a balancing approach derived from the federal standard in *Vernonia*.

In a brief discussion, the court then dismissed the argument that the policy violated article I, section 23, Indiana’s Equal Privileges and Immunities Clause.¹⁰¹ Section 23 requires that “privileges or immunities” granted “to any citizen, or class of citizens,” must “upon the same terms, . . . equally belong to all citizens.”¹⁰² To satisfy this constitutional provision, “the disparate treatment accorded . . . must be reasonably related to inherent characteristics which distinguish the unequally treated classes . . . [and] the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.”¹⁰³ The court said that the party attacking the classification must negate every reasonable basis for it, and in this case the *Linkes* failed to meet that standard because those subject to drug testing represent the school outside normal school hours and away from the campus. Thus, the class of students tested is inherently different from the class not tested.¹⁰⁴

Justice Boehm dissented in an opinion joined by Justice Rucker. The dissenters first analyzed the majority’s decision to adopt the *Vernonia* framework. They concluded that the circumstances relied upon by the U.S. Supreme Court to permit drug testing in *Vernonia*—under the “special needs” doctrine announced in *New Jersey v. T.L.O.*¹⁰⁵—were absent in this case. *Vernonia* analyzed a program of drug testing for athletes under circumstances in

96. *Id.* at 983.

97. *Id.* at 984.

98. *Id.* at 984.

99. *Id.* at 984-85.

100. *Id.* at 985.

101. *Id.* at 985-86.

102. IND. CONST. art I, § 23.

103. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

104. *Linke*, 763 N.E.2d at 986.

105. 469 U.S. 325 (1985).

which a school's drug crisis was instigated by athletes.¹⁰⁶ In *Linke*, in contrast, the school's drug problem was not as severe and had not been linked in any way to the group targeted for testing.¹⁰⁷ Nor were any other circumstances present in this case to justify invoking the "special needs" analysis created by the U.S. Supreme Court.¹⁰⁸

After rejecting the *Vernonia* approach, the dissenters nevertheless analyzed the factors set forth in that opinion, arriving at a different balance than the *Linke* majority. The dissenters found that students' decreased privacy interest could justify intrusions when matters of discipline or conduct were at issue, but would not justify suspicionless searches conducted as a matter of routine.¹⁰⁹ The dissenters also rejected the notion that the students "consented" to the tests. They found that participation in extracurricular activities (as well as co-curricular activities relating to for-credit classes) are important, and declining to participate in drug testing could have serious consequences relating to grades and college admissions.¹¹⁰ The dissenters also rejected the "role model" justification for drug testing, arguing that the need to set a good example cannot outweigh interests under article I, section 11.¹¹¹

The dissenters also rejected the notion that the tests were less intrusive because they were performed by school officials rather than police. Both teachers and police officers are agents of the state, and they are equally bound by article I, section 11.¹¹² They also concluded that the "preventive" or "rehabilitative" purpose of the program found by the majority lacked support.¹¹³ The cases relying on those purposes to justify testing involved much more serious drug problems that interfered with the daily operation of schools¹¹⁴ and—unlike the program in *Linke*—targeted portions of the student population directly linked to the drug problem.¹¹⁵ The dissenters argued that the even if the drug problem in *Linke* was serious enough to support testing (a fact they did not concede), the school had failed to show a connection between the drug problem and the students being tested, thus failing to satisfy article I, section 11.¹¹⁶ The dissenters also noted that not only was suspicion-based testing feasible in this

106. *Linke*, 763 N.E.2d at 988 (citing *Vernonia Sch. Dist. 475 v. Acton*, 515 U.S. 646, 663 (1995)).

107. *Id.* at 989.

108. *Id.* (discussing *Chandler v. Miller*, 520 U.S. 305 (1997) (rejecting "special needs" argument for drug testing political candidates)).

109. *Id.* at 990 (citing *T.L.O.*, 469 U.S. at 336).

110. *Id.* at 991.

111. *Id.* at 992.

112. *Id.* at 992-93. The dissenters stated clearly that the language in the majority opinion should not be read to support stronger article I, section 11 restrictions on police as compared to other government agents.

113. *Id.* at 993.

114. *Id.* at 994.

115. *Id.*

116. *Id.* at 995.

case, but suspicion-based testing was actually a part of the program already in place at the school.¹¹⁷ The program thus was further undermined both because the school could test based on suspicion and because the group of students tested was not connected to the drug problem.¹¹⁸

The dissenters also found that the program failed the test of article I, section 23. The dissenters found that although there were “inherent” differences between the group tested and the group not tested, those differences were not linked to the drug problem because there was no showing that the tested group was more likely to be involved with drugs.¹¹⁹ Thus, there was no “reasonable relation” between the group’s characteristics and the testing program.

Just a few weeks after the Indiana Supreme Court’s decision in *Linke*, the U.S. Supreme Court decided *Board of Education of District Number 92 v. Earls*,¹²⁰ adopting an analysis almost identical to the majority’s analysis in *Linke*. The U.S. Supreme Court examined a “voluntary” random drug testing scheme similar to that in *Linke* and adopted a three-part balancing test similar to *Linke*’s majority test, weighing the privacy interest, the degree of intrusion, and the school’s interest.¹²¹ Like the *Linke* majority, the majority in *Earls* upheld the drug testing program against a Fourth Amendment attack. The dissenting opinion, written by Justice Ginsburg and joined by three other justices, included reasoning similar to the *Linke* dissent.¹²²

3. *Double Jeopardy*.—The Indiana Supreme Court also clarified the analysis required by article I, section 14, Indiana’s Double Jeopardy Clause, for multiple punishments. Again, the court’s decision brought the outcome under the Indiana Constitution closer to that under federal law.

In 1999, in its decision in *Richardson v. State*,¹²³ the Indiana Supreme Court sought to bring order to the chaos that had existed under the state’s double-jeopardy provision. *Richardson* sought to harmonize decades of seemingly inconsistent caselaw, reducing Indiana’s double-jeopardy test to a two-pronged inquiry that provided more protection than the Federal Double Jeopardy Clause.¹²⁴ The court concluded that Indiana’s Double Jeopardy Clause is “intended to prevent the State from being able to proceed against a person twice for the same criminal transgression.”¹²⁵ The court held that “two or more offenses are the ‘same offense’ in violation of article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged

117. *Id.*

118. *Id.* at 995-96.

119. *Id.* at 996-97.

120. 122 S. Ct. 2559 (2002).

121. *Id.* at 2565-69.

122. *Id.* at 2571 (Ginsburg, J., dissenting).

123. 717 N.E.2d 32 (Ind. 1999).

124. *Id.* at 49-50.

125. *Id.* at 49.

offense.”¹²⁶ Thus, a defendant could not be convicted of two crimes if the two crimes had the “same elements” (the same analysis as the federal *Blockburger*¹²⁷ test) or if the “same evidence” was used to convict of both crimes.

After applying *Richardson* for a period of time, lower courts remained confused about the “same evidence” prong of the Indiana test. Some defendants claimed that they could not be convicted of two crimes if *any* evidentiary fact was common to the two charges.¹²⁸ The State’s position, however, was that article I, section 14 did not prevent a conviction so long as there was at least one evidentiary fact supporting each conviction that did not support the other conviction.

In *Spivey v. State*, the Indiana Supreme Court resolved this issue, accepting the view proffered by the State. The court concluded that “the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.”¹²⁹

The specific question in *Spivey* was whether the defendant could be convicted of both felony murder (based on the underlying crime of burglary) and conspiracy to commit a felony.¹³⁰ The defendant admitted the conspiracy and the burglary, but he denied any connection to the death that occurred during the burglary.¹³¹ The court analyzed the article I, section 14 question as follows: the evidentiary facts used to establish that the defendant committed conspiracy included proof of the breaking and entering and intent to commit a felony. They did not include evidence of the killing that occurred during the burglary. The evidentiary facts used to establish that the defendant committed felony murder “established that [the victim] was killed in the course of the defendant’s commission of burglary.”¹³² These facts did not include any proof of conspiracy. “Thus, although the evidence proving each offense also proved some elements of a second offense, in neither case did the same evidentiary facts establish all of the essential elements of both offenses.”¹³³ The two convictions therefore did not violate the “same evidence” prong of Indiana’s Double Jeopardy Clause.¹³⁴

126. *Id.* (emphasis in original).

127. *Blockburger v. United States*, 284 U.S. 299 (1932).

128. *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002).

129. *Id.* at 833.

130. *Id.* at 833-34.

131. *Id.*

132. *Id.* at 833.

133. *Id.* at 834.

134. *Id.* Justice Rucker dissented in part, with Justice Sullivan joining his opinion. He agreed that the two convictions did not violate Indiana’s double jeopardy provision. However, relying on *Pierce v. State*, 761 N.E.2d 826 (Ind. 2002), decided the same day as *Spivey*, he asserted that the conspiracy conviction violated the common law rule that a defendant may not be convicted of conspiracy when “the overt act that constitutes an element of the conspiracy is the same act as another crime for which the defendant has already been convicted.” *Spivey*, 761 N.E.2d at 836-37 (Rucker, J., concurring in part and dissenting in part).

This analysis—under which two convictions may stand so long as one evidentiary fact that supports each conviction does not support the other conviction—tends to merge with the “same elements” test under Indiana law and *Blockburger*.¹³⁵ Although one can envision situations in which two convictions will pass the “same elements” test but fail the “same evidence” test,¹³⁶ such situations are likely to be few and far between. By failing to adopt the more expansive construction of the “same evidence” portion of *Richardson*,¹³⁷ the Indiana Supreme Court has brought the outcome under the Indiana Double Jeopardy Clause into near alignment with the outcome under its federal analogue. The analysis is different, but the results will be the same in the great majority of cases.

Although the outcome under the Indiana Constitution now is aligned with the outcome under the Seventh Amendment, Indiana uses non-constitutional statutory and common law principles to limit multiple convictions in a manner that goes beyond federal law.¹³⁸ These statutory and common law doctrines will more frequently prohibit multiple punishments in situations where it would be permitted by the Federal Double Jeopardy Clause, but those principles, not the Indiana Constitution, provide the additional protection.

Guyton v. State,¹³⁹ decided shortly after *Spivey*, departed from the recent framework governing state double-jeopardy decisions and appeared to indicate that a majority of justices favored an approach different from *Richardson*. Guyton was convicted both of murder and carrying a handgun without a license. He argued on appeal that there was a “reasonable possibility” (*Richardson*’s words) that the jury inferred that Guyton unlawfully possessed a handgun from

135. See discussion *supra* note 127 and accompanying text.

136. A hypothetical passing the “same elements” test but failing “same evidence” is as follows: a perpetrator approaches a victim and says “Stay right where you are or I’ll shoot.” Without saying more, he takes the victim’s wallet. Among the charges that could be brought would be robbery (Indiana Code section 35-42-5-1) and confinement (Indiana Code section 35-42-3-3). To prove robbery, the state would have to show that the perpetrator knowingly took property from another person by threat of force or placing the victim in fear. To prove confinement, the state would have to show that the perpetrator knowingly confined the victim without the victim’s consent. These two charges pass the same elements test because each has at least one element that the other does not. Robbery requires proof of taking property and force or placing the victim in fear; confinement requires proof of confinement. But in this scenario, the same fact, the statement “Stay right where you are or I’ll shoot” is likely to prove both the threat of force element of robbery and the confinement element of confinement, thereby violating the “same evidence” test under the Indiana Constitution.

137. See discussion *supra* note 126 and accompanying text.

138. E.g., *Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002) (recognizing that burglary and robbery cannot both be subject to sentencing enhancement based upon the same bodily injury). See also Joel Schumm, *The Mounting Confusion Over Double Jeopardy in Indiana*, 46 RES GESTAE 27, 27-28 (Oct. 2002).

139. 771 N.E.2d 1141 (Ind. 2002).

the testimony that he fired the gun at his murder victim.¹⁴⁰ If that were the case, all the facts supporting the weapons conviction would also have been used to support the felony murder conviction requiring vacation of the weapons conviction.

In *Guyton*, the chief justice, writing for himself and Justices Sullivan and Rucker, analyzed the double-jeopardy issue not under the constitutional “same elements” and “same evidence” rubric of *Richardson*, but rather by use of the five categories of forbidden double jeopardy recited by Justice Sullivan in his concurrence in *Richardson*.¹⁴¹ After listing each of the five categories detailed by Justice Sullivan,¹⁴² the court concluded that “Guyton’s claim . . . does not succeed under any of the above” categories, and therefore his convictions did not violate article I, section 14.¹⁴³

Justice Boehm concurred in the result, but wrote separately to criticize *Richardson* (in which he had concurred in result although he disagreed with the analytical approach).¹⁴⁴ He wrote:

In *Richardson*, a three Justice majority announced an “actual evidence” test for double jeopardy under the Indiana Constitution as applied to multiple convictions in the same trial. *Richardson* formulated the test for Indiana constitutional double jeopardy as whether there is a “reasonable possibility” that the “evidentiary facts” supporting one conviction were used by the jury to support another. In substance, applying this *Richardson* test means opting for (1) psychoanalyzing the

140. This contention is mostly clearly outlined in Justice Boehm’s concurrence. *Id.* at 1152-53 (Boehm, J., concurring).

141. *Id.* at 1143 (citing *Richardson v. State*, 717 N.E.2d 32, 56-57 (Ind. 1999) (Sullivan, J., concurring)). The thrust of Justice Sullivan’s *Richardson* concurrence seemed to be that he understood the multiple punishments prong of Indiana’s Double Jeopardy Clause to preclude only the five kinds of multiple convictions that he enumerated, and he understood the majority’s opinion to encompass those five situations and no more. He concurred even though the *Richardson* majority reached its conclusion by a different analysis. *Richardson*, 717 N.E.2d at 56-57.

142. Justice Sullivan’s concurrence indicated his understanding that the Indiana Double Jeopardy Clause precluded the following: 1) “[c]onviction and punishment for an enhancement of a crime where the enhancement [rests] on the very same behavior or harm as another crime for which the defendant has been convicted and punished”; 2) “[c]onviction and punishment for a crime which is a lesser included offense of another crime for which the defendant has been convicted and punished”; 3) “[c]onviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished”; 4) “[c]onviction and punishment for a crime which is the very same act as an element of another crime for which the defendant has been convicted and punished”; and 5) “[c]onviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished.” *Id.* at 56-57.

143. *Guyton*, 771 N.E.2d at 1143.

144. *Richardson*, 717 N.E.2d at 57-73 (Boehm, J., concurring).

jury based on evidence, argument, instructions and charging instruments and indulging the irrebuttable presumption the jury followed all of these; (2) the "reasonable possibility" standard to determine whether that occurred, and (3) the requirement that "all" not just one of the "evidentiary facts" overlap.¹⁴⁵

Justice Boehm went on to note the majority's reliance on Justice Sullivan's *Richardson* concurrence, which he said raises the question "how we know when we have two crimes supported by the 'very same act.'"¹⁴⁶ He continued: "I think we owe an explanation of this mystery because I believe today we have in effect abandoned *Richardson*, and should be explicit in doing this so future trial and appellate courts can follow a consistent methodology in reviewing double jeopardy claims."¹⁴⁷

Justice Boehm stated that *Richardson* had failed in its goal of establishing a single, comprehensive rule for the multiple prosecutions branch of Indiana double-jeopardy law.¹⁴⁸ It had failed, he wrote, to take into account various statutory and common law rules that supplemented the basic constitutional protection.¹⁴⁹ He proposed revising *Richardson* to embody instead a "same facts" test to go along with *Richardson*'s "same elements" test.¹⁵⁰ He criticized both *Richardson*'s "evidentiary facts" terminology and the "very same act" phrasing used by the majority in *Guyton*, arguing that "same facts" is clearer and easier to understand.¹⁵¹

After explaining the utility of his "same facts" formulation, Justice Boehm concluded his concurrence by stating his agreement with the majority's view that *Guyton*'s two convictions did not violate the Double Jeopardy Clause.¹⁵² "But I think that it takes some explanation as to why that is true, and what methodology is required to reach that conclusion."¹⁵³ Justice Boehm's conclusion was that "the Court today handled this [analysis] the way pre-*Richardson* appellate courts typically did by determining, under a de novo review of whatever is relevant, whether the facts of one crime are such that the 'same fact' fits one of the Sullivan rules [in his *Richardson* concurrence]."¹⁵⁴ The majority looked, Justice Boehm wrote, at the statutes, charging instruments, evidence and arguments of counsel to determine that the facts establishing one offense were not the same as the facts establishing the other and it did so de

145. *Guyton*, 771 N.E.2d at 1148 (Boehm, J., concurring).

146. *Id.* at 1148-49.

147. *Id.* at 1149.

148. *Id.* at 1149-50.

149. *Id.* at 1149 (citing *Pierce v. State*, 761 N.E.2d 826 (Ind. 2002) (acknowledging the existence of statutory and common law rules supplementing *Richardson*)).

150. *Id.* at 1150.

151. *Id.* at 1150-51.

152. *Id.* at 1153.

153. *Id.*

154. *Id.* at 1153-54.

novo, without reference to what the jury might reasonably have considered.¹⁵⁵ In Justice Boehm's view, this methodology is what the court should forthrightly acknowledge that it is using.

Justice Dickson wrote a concurrence explaining that Guyton's convictions did not constitute double jeopardy under the majority analysis in *Richardson*.¹⁵⁶ He began his analysis by stating that the majority opinion in *Guyton* does not contain constitutional analysis, but rather only analyzes the claim under statutory and common law. The other four justices appear to disagree with this assertion, as both the majority opinion and Justice Boehm's dissent include constitutional terms.¹⁵⁷ Guyton's conviction did not violate the *Richardson* test, Justice Dickson wrote, because "[i]t is not reasonably possible that the jury ignored this evidence [that Guyton admitted possessing a handgun before the murder] and instead based its finding of guilt solely on the defendant's possession of the weapon at the time he fired it at [his victim]."¹⁵⁸

Justice Dickson then criticized Justice Boehm's assertion that the *Richardson* analysis should be modified to include a "same facts" analysis.¹⁵⁹ Justice Dickson argued that a "same facts" analysis "significantly lessens the protection provided by the Indiana Double Jeopardy Clause" and he cited several examples in which, in his view, the "same facts" approach would validate convictions that *Richardson* would reverse.¹⁶⁰

Since *Guyton*, the court has followed the *Spivey* formulation in other cases.¹⁶¹ The Indiana Court of Appeals, however, followed *Guyton* in one case by using the categories from Justice Sullivan's *Richardson* concurrence rather than the "same evidence" test.¹⁶² Nevertheless, *Guyton* places a cloud over *Richardson*, and it remains to be seen whether the courts will follow *Richardson*, explicitly alter it, or alter it in a piecemeal fashion, as it plainly did in *Spivey*.

4. *Free Expression*.—The Indiana Court of Appeals expanded free expression rights under article I, section 9 of the Indiana Constitution in *Mishler v. MAC Systems, Inc.*¹⁶³ The Mishlers hired MAC to perform construction on buildings they owned. After trouble between the parties and a stop-work order by a building inspector, the Mishlers posted signs on the property prominently

155. *Id.*

156. *Id.* at 1145-48. Although Justice Dickson's concurrence precedes Justice Boehm's in the reported opinion because of Justice Dickson's seniority, I discuss Justice Dickson's concurrence after Justice Boehm's because its substantial element of response to Justice Boehm makes this order more logical.

157. *Id.* at 1142-43 (majority); *id.* 1148 (Boehm, J., concurring).

158. *Id.* at 1146.

159. *Id.*

160. *Id.*

161. See, e.g., *Carrico v. State*, 775 N.E.2d 312 (Ind. 2002); *Robinson v. State*, 775 N.E.2d 316 (Ind. 2002). See also Joel Schumm, *Run-of-the-Mill Issues, Predictable Results*, RES GESTAE 26, 26-28 (Dec. 2002) (summarizing decisions under article I, section 14).

162. *Oeth v. State*, 775 N.E.2d 696, 702-03 (Ind. Ct. App. 2002).

163. 771 N.E.2d 92 (Ind. Ct. App. 2002).

stating that MAC was subject to a stop-work order, listing the code violations found by the building inspector, and concluding that MAC's "contract states quality work to us and many others[.] This is not [quality work.] Claimed to be a member of B[etter] B[usiness] B[ureau.] Not."¹⁶⁴

The Mishlers sued MAC, and MAC's counterclaims included slander.¹⁶⁵ MAC also sought an injunction against the Mishlers' sign and other negative verbal and written public statements about MAC's work.¹⁶⁶ The trial court granted an injunction requiring the Mishlers to remove the sign and prohibiting other signs criticizing MAC.¹⁶⁷

The court of appeals analyzed the Mishlers' claim that the injunction was an unconstitutional prior restraint under article I, section 9.¹⁶⁸ Relying on federal precedents, the court of appeals determined that prior restraints are especially damaging because they preclude speech before the courts have had a full opportunity to address the underlying issues on the merits.¹⁶⁹ The court also noted that harm to reputation may be redressed through damages after the fact, and it cited Indiana decisions so holding.¹⁷⁰

The court then reviewed the language of section 9: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."¹⁷¹ The court concluded that although section 9 is written as a restriction on the legislature, it "is intended to prohibit Indiana courts, as well as the General Assembly, from abridging the free speech rights of Indiana citizens."¹⁷² The section should be treated as applying to all state action, the court held.¹⁷³ The court also held that the so-called "freedom and responsibility" phrasing of the section—creating a broad free expression right, but holding persons accountable for "the abuse of that right"—squares with damages for harm caused by irresponsible expression, not prior restraint.¹⁷⁴

The court invalidated the injunction against the Mishlers based both on the importance of free expression under the Indiana Constitution and on the preliminariness of the litigation, in which no ruling on the merits of the slander claim had been made.¹⁷⁵ The court did not rule out all injunctions against speech

164. *Id.* at 94.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 94-95.

169. *Id.* at 95 (citing, e.g., *Alexander v. United States*, 509 U.S. 544 (1993); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973)).

170. *Id.* at 96 (citing *St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho*, 663 N.E.2d 1220 (Ind. Ct. App. 1996)).

171. IND. CONST. art. I, § 9.

172. *Mishler*, 771 N.E.2d at 97.

173. *Id.*

174. *Id.* at 98 (citing *Ex parte Tucker*, 220 S.W. 75, 76 (Tex. 1920)).

175. *Id.* at 98-99.

or expression, only those made at a preliminary stage of litigation.¹⁷⁶

5. *Jury Trial Rights*.—The Indiana Supreme Court decided two cases regarding jury trial rights. In *Songer v. Civitas Bank*,¹⁷⁷ the court reviewed the right to jury trial under article I, section 20 of the Indiana Constitution. The Indiana Constitution preserves the right to jury trial as it existed at common law, so a party is entitled to a jury trial only on legal, not equitable, claims.¹⁷⁸ In this case, Civitas was suing Songer, seeking to collect on a note and mortgage.¹⁷⁹ Because the claim had both legal and equitable features, the court had to determine whether Songer had a right to trial by jury. The applicable principle of law, set forth in the Nineteenth Century but still applicable today, is that “where equity takes jurisdiction of the essential features of a cause, it will determine the whole controversy, though there may be incidental questions of a legal nature.”¹⁸⁰

After quoting this rule, the court noted that “[t]he inverse must also be true. Where equity does not take jurisdiction of the essential features of a cause, a multi-count complaint may be severed, and different issues may be tried before either a jury or the court at the same proceeding.”¹⁸¹ The court summarized the rule as follows: “Where the essential features of a suit sound in equity, such that the equitable relief asked for is not separate and apart from the legal relief sought, the entire action is drawn into equity.”¹⁸² The court went on to note that some recent cases appeared to misinterpret the rule by holding that if any claim in a case was essentially equitable, then the entire case was drawn into equity.¹⁸³

The court ruled that Civitas Bank’s case against Songer was essentially equitable, and therefore not subject to the jury trial right under the Indiana Constitution, because the core of the action was the bank’s desire to establish the amount the bank could collect from its collateral.¹⁸⁴ Although the bank also claimed a money judgment, “the essence of the claim was for a judicial pronouncement that Civitas’ possessory lien was perfected and that the collateral could be liquidated.”¹⁸⁵ The action was “essentially equitable,” so the entire

176. Judge Robb concurred, asserting that the court need not address the constitutional issue. Rather, she noted, the Mishlers should prevail because MAC could show no more than “mere economic injury” that could be compensated after judgment; therefore, MAC was not entitled to preliminary injunctive relief. *Id.* at 99 (Robb, J., concurring).

177. 771 N.E.2d 61 (Ind. 2002).

178. *Id.* at 63.

179. *Id.* at 62-63.

180. *Id.* at 65 (quoting *Field v. Brown*, 45 N.E.2 464, 464 (Ind. 1896)).

181. *Id.* at 66.

182. *Id.* at 67.

183. *Id.* at 67-68 (stating that *Baker v. R & R Construction, Inc.*, 662 N.E.2d 661 (Ind. Ct. App. 1996); *Levinson v. Citizens National Bank of Evansville*, 644 N.E.2d 1264 (Ind. Ct. App. 1994); *Weisman v. Hopf-Himsel, Inc.*, 535 N.E.2d 1222 (Ind. Ct. App. 1989); and *Jones v. Marengo State Bank*, 526 N.E.2d 709 (Ind. Ct. App. 1988) incorrectly apply the rule).

184. *Id.* at 69.

185. *Id.*

action was drawn into equity.¹⁸⁶

The Indiana Supreme Court also ruled in *Jordan v. Deery* that the right to jury trial under article I, section 20 of the Indiana Constitution includes an almost absolute right for the plaintiff to personally be present in the courtroom for trial.¹⁸⁷ *Jordan* presented the tort claim of a child who was severely disabled at birth; the claim was that poor medical care was the cause of the disability.¹⁸⁸ The defendant hospital and physicians prevailed at trial, but only after the trial court judge excluded the seven-year-old plaintiff from the courtroom.¹⁸⁹ The trial court applied *Gage v. Bozarth*,¹⁹⁰ in which the court permitted a plaintiff to be excluded if the defendant could show that the plaintiff's presence was potentially prejudicial to the jury and the plaintiff could not understand the proceedings or meaningfully assist counsel.¹⁹¹

The disabled child argued on appeal that she had a right to be present in the courtroom, and the Indiana Supreme Court ruled in a 4-1 decision that her near-absolute right to be present was grounded in article I, section 20.¹⁹² That section states "In all civil cases, the right of trial by jury shall remain inviolate."¹⁹³ In addressing section 20, Justice Rucker, writing for the majority, reviewed the standard usually applied to questions of law under the Indiana Constitution. The standard addresses relevant text, history, structure, and purpose of the constitution, and case law interpreting it.¹⁹⁴ The majority then explicitly departed from that standard, stating that "these 'constitutional talismans' or guideposts are not always instructive. Under such circumstances, it becomes appropriate to look elsewhere, including case law from other states interpreting similar provisions in their constitutions."¹⁹⁵

In its analysis, the majority found little assistance in historical materials or case law. There is little in the debates or other materials relating to the 1850 constitutional convention to illuminate the framers' purposes in enacting section 20, which is very similar to the jury guarantee in the 1816 Indiana Constitution.¹⁹⁶ The majority found that although several cases have interpreted

186. *Id.*

187. 778 N.E.2d 1264 (Ind. 2002).

188. *Id.* at 1265.

189. *Id.* at 1267.

190. 505 N.E.2d 64 (Ind. Ct. App. 1987) (citing *Helminski v. Ayerst Lab.*, 766 F.2d 208, 218 (6th Cir. 1985)).

191. *Jordan*, 778 N.E.2d at 1266.

192. IND. CONST. art. I, § 20.

193. *Jordan*, 778 N.E.2d at 1269. The Jordans had argued that *Helminski* was abrogated by the federal Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. The Indiana Supreme Court did not adjudicate that question, and it noted that the question apparently had not been decided by any other court. *Id.* at 1267.

194. *Id.* at 1268 (citing *McIntosh v. Melroe*, 729 N.E.2d 972, 974 (Ind. 2000)).

195. *Id.* (citations omitted).

196. *Id.* at 1269 (citing 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 226, 352-53 (A.H. Brown ed.,

the section over the years, they merely stand for the principle that the framers intended the 1851 constitutional provision to retain the jury trial right as it existed at common law.¹⁹⁷

The majority went on to look at decisions from other jurisdictions, including New York, Florida, Connecticut, Oklahoma, Missouri, and South Dakota, all of which have established a broad right for the plaintiff to be present in the courtroom. These decisions were sometimes based on constitutional language similar to Indiana's jury-trial guarantee or the "open courts" provision in article I, section 12 of the Indiana Constitution.¹⁹⁸ The majority concluded, "we agree with those jurisdictions that have held that the state constitutional right of trial by jury includes the ancillary right to be present in the courtroom during both the liability and damage phase of trial."¹⁹⁹ The majority reasoned, "without the right to be present, the right to trial by jury becomes meaningless."²⁰⁰ While reversing the trial court and remanding for a new trial during which the disabled child would be present, the majority nevertheless qualified the right by stating that it would not apply if there were "waiver or extreme circumstances."²⁰¹

Justice Boehm dissented, arguing that there is a right to be present at trial, but it is a qualified right that arises not from the guarantee of jury trial, but rather from "the federal right to due process of law and the concept of fundamental fairness."²⁰² Justice Boehm noted that if the right arises from the constitutional jury trial guarantee, then there would be no right to be present at a bench trial.²⁰³ He argued for a balancing test similar to *Helmski* that would allow the plaintiff to be present when the plaintiff could assist counsel, but would allow exclusion when the plaintiff could not assist and would likely prejudice the jury.²⁰⁴

The basis for the due process right to be present, Justice Boehm argued, is that a party who can effectively communicate with and assist counsel is deprived of a right to be heard if she cannot be present in court.²⁰⁵ On the other hand, when the party cannot assist counsel, her presence is not vital to a fair proceeding and the potential for prejudice may be balanced against the right to be present.²⁰⁶

1850); JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 80, 90, 204 (Austin H. Brown ed., 1851) (reprint 1936)).

197. *Id.* at 1270.

198. *Id.* at 1270-71.

199. *Id.* at 1271.

200. *Id.* at 1272. This assertion is problematic. For a person who is comatose or unable to understand the nature of the proceedings (one of the prerequisites to exclusion under *Helmski*), presence during the trial by jury can be of no additional benefit. For such persons, the trial itself, not presence at the trial, provides the benefit guaranteed by the constitutional provision.

201. *Id.* at 1270. One important question not answered by the majority's opinion is whether it conveys an absolute right for a prisoner to be present during a civil trial.

202. *Id.* at 1273 (Boehm, J., dissenting).

203. *Id.*

204. *Id.*

205. *Id.* at 1274.

206. *Id.*

Justice Boehm agreed with the majority that there is little in Indiana's constitutional history that sheds light on any relationship between the jury trial right and a right to be present at trial.²⁰⁷ He noted that the majority of jurisdictions, including the federal courts, apply the balancing test he advocates.²⁰⁸ Justice Boehm would have affirmed the trial court's ruling excluding the plaintiff because the trial court found that the plaintiff's presence was likely to prejudice the jury, thus depriving the defendants of their right to a fundamentally fair proceeding.²⁰⁹

6. *Governmental Demands for "Particular Services".*—The Indiana Supreme Court decided one case implicating the portion of article I, section 21 of the Indiana Constitution, stating that "[n]o person's particular services shall be demanded, without just compensation."²¹⁰ The issue arose in *Sholes v. Sholes*,²¹¹ in which the main question involved the meaning of Indiana's civil appointment of counsel statute.²¹² The court determined that the statute required trial courts to appoint counsel for indigent civil litigants, plaintiffs or defendants, when the trial court determines that the litigant is indigent and also determines that the case is sufficiently complex, or the litigant sufficiently unsophisticated, that counsel is required in the specific circumstances of the case.²¹³

The court went on to analyze whether counsel appointed under the statute must be compensated. It concluded that the Particular Services Clause of article I, section 21 requires compensation.²¹⁴ The court made clear that lawyers may accept appointments under the statute without compensation, but found support in at least three Nineteenth Century cases for the proposition that lawyers could not be required to represent civil litigants without compensation.²¹⁵ The court's brief analysis of the constitutional provision relies almost entirely on the historical fact that lawyers have been compensated for the services they provide.²¹⁶ This element satisfies the part of the "particular services" analysis set forth in *Bayh v. Sonnenburg*²¹⁷ addressing whether the service in question has been compensated historically. The second element of *Bayh* analysis is whether the services are required of all citizens or only of a specified subset of citizens.²¹⁸ Although the court did not provide lengthy analysis on the second element, it apparently concluded that only the services of one particular group of

207. *Id.* at 1274-75.

208. *Id.*

209. *Id.* at 1276.

210. IND. CONST. art. I, § 21.

211. 760 N.E.2d 156 (Ind. 2001).

212. IND. CODE § 34-10-1-2 (2002).

213. *Sholes*, 760 N.E.2d at 159-61.

214. *Id.* at 162.

215. *Id.* (citing *Bd. of Comm'rs v. Pollard*, 55 N.E. 87 (1899); *Webb v. Baird*, 6 Ind. 13 (1854); *Blythe v. State*, 4 Ind. 525 (1853)).

216. *Id.* at 164.

217. 573 N.E.2d 398, 415 (Ind. 1991).

218. *Id.* at 415-17.

citizens—lawyers—is demanded by Indiana Code section 34-10-1-2. Because both elements were present, the Particular Services Clause mandated compensation.²¹⁹

Justice Dickson dissented from the portion of the opinion applying the Particular Services Clause.²²⁰ He performed historical analysis, uncovering statutes from 1818 and 1843 (enacted before the present constitution) that required uncompensated representation of indigent litigants. Justice Dickson relied on language in *Bayh v. Sonnenburg* stating that when the Particular Services Clause was enacted “the framers did not intend this clause to create new rights to compensation for services provided to the state that had gone historically uncompensated.”²²¹ Because statutes predating the 1851 constitution required uncompensated representation of indigents, Justice Dickson reasoned, the Particular Services Clause does not mandate such compensation.²²² Justice Dickson also asserted that lawyers have a special obligation to provide free services as “an inherent aspect of being a lawyer.”²²³

7. *Equal Privileges and Immunities*.—The Indiana Supreme Court decided one case applying the Equal Privileges and Immunities Clause of article I, section 23 of the Indiana Constitution, but the case broke little new ground. In *Lake County Clerk’s Office v. Smith*,²²⁴ the court rejected a challenge to Indiana’s bail statutes. Bail agents challenged Indiana’s system, under which a defendant may be admitted to bail either by posting a bond provided by an approved bail agent or by posting cash or securities worth ten percent of the bail amount.²²⁵ When a bail bond is provided by a bail agent and the defendant fails to appear, the bail agent must pay a late surrender fee.²²⁶ When the defendant posts the ten percent cash bail and fails to appear, the defendant forfeits bail in most circumstances and is subject to arrest.²²⁷

The court rejected the argument that these differences violated the Equal Privileges and Immunities Clause because bail agents whose defendants failed to appear were subject to late surrender fees, but defendants posting ten percent cash bond were not subject to such penalties.²²⁸ Applying the test used in *Collins v. Day*,²²⁹ the court easily determined that the disparate treatment of bail agents and defendants posting their own bail was related to inherent characteristics distinguishing the two groups from one another.²³⁰ The court noted first that in

219. *Sholes*, 760 N.E.2d at 164.

220. *Id.* at 167 (Dickson, J., dissenting).

221. *Id.* at 168 (quoting *Bayh*, 573 N.E.2d at 413).

222. *Id.*

223. *Id.*

224. 766 N.E.2d 707 (Ind. 2002).

225. *Id.* at 709 (citing IND. CODE § 35-33-8-3.2 (2002)).

226. IND. CODE § 27-10-2-12 (2002).

227. *Id.* § 35-33-8-7.

228. *Smith*, 766 N.E.2d at 714.

229. 644 N.E.2d 72, 80 (Ind. 1994).

230. *Smith*, 766 N.E.2d at 714.

fact bail agents were probably treated more favorably under the law because a defendant posting his own bail and failing to appear often lost the entire amount, while bail agents lost only a percentage.²³¹ The court then concluded that any disparate treatment was properly based on the fact that bail agents act for profit, and they must have financial incentives to ensure the appearance of defendants, while the defendants themselves have other incentives to appear, including both the potential loss of their own money and potential arrest.²³² These differences justified the disparate treatment. This outcome was identical to the result obtained by the court from analysis under the Federal Equal Protection Clause.²³³

II. TRENDS IN INDIANA CONSTITUTIONAL LAW

The individual rights provisions of article I have thus far been a source of few new rights for citizens of Indiana. Analysis of topics such as speech about police, corporate worship, and double jeopardy reveal that citizens of Indiana enjoy slightly greater protections under the state constitution than under the Federal Constitution. But as a general matter, these differences are not substantial. Of course, future developments remain to be seen.

An irony in this development resides in the standard of review prescribed for questions arising under the Indiana Constitution, which points to text, history, structure and function, and case law as guideposts to determine "common understanding of both those who framed it and those who ratified it," a jurisprudence of original intent.²³⁴ Thus, when matters are not resolved based on the language of the Indiana Constitution alone, the analysis is largely historical. The standard looks at the history of the Constitutional Convention, using its transcripts.²³⁵ It also looks at case law interpreting the provision over the years, especially in the time period before provisions of the United States Constitution were incorporated against the states.²³⁶ This approach undergirded the Indiana Supreme Court's initial forays into independent state constitutional jurisprudence, such as *Price v. State*, which relied extensively on the historical context of the times of statehood and the Constitutional Convention to support the importance of speech on issues of public importance.²³⁷

Gerschoffer, Linke, and Spivey, however, followed the standard of review less meticulously and reached results more in keeping with the federal standards

231. *Id.* at 713-14.

232. *Id.* at 714.

233. *Id.* at 712-13.

234. *See supra* note 37.

235. *E.g.*, *Ind. Gaming Comm'n v. Moseley*, 643 N.E.2d 296, 298 (Ind. 1994).

236. *E.g.*, *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999); *City Chapel Evangelical Free v. City of South Bend*, 744 N.E.2d 443 (Ind. 2001).

237. *Price v. State*, 622 N.E.2d 954 (Ind. 1993). In *Price*, the Indiana Supreme Court majority relied on historical background information, such as the natural law frame of reference and Jacksonianism of the framers of the 1851 Constitution. *Id.* at 958-59.

under the Fourth and Seventh Amendments, respectively.²³⁸ Neither the Search and Seizure Clause nor the Double Jeopardy Clause of the Indiana Constitution is associated with any specific or unique discussion in the debates of the Constitutional Convention. There is no unique Indiana history of these provisions. The Indiana Supreme Court (unlike the court of appeals in *Gerschoffer* and *Linke*) therefore determined not to base its decisions on the general historical background of Jacksonianism and wariness of state authority. Rather, the court looked to other sources, including decisions from the courts of other states and the United States, as primary guidance.²³⁹

In *Jordan v. Deery*, moreover, the Indiana Supreme Court for the first time explicitly stated that it would depart from its oft-stated standard, disregarding the “‘constitutional talismans’ or guideposts” when they are not “‘instructive.’”²⁴⁰ In *Jordan*, the supreme court majority relied explicitly on a few other jurisdictions that had interpreted constitutional provisions similar to Indiana’s.²⁴¹ They did so although most jurisdictions, including the federal courts interpreting nearly identical constitutional language, had adopted a contrary rule.²⁴² If *Jordan* is the explicit end of the standard of review that the Indiana Supreme Court has applied to new questions of law under the Indiana Constitution since at least 1991,²⁴³ it may be that the standard was implicitly jettisoned in earlier cases such as *Gerschoffer*. As the Indiana Supreme Court has moved away from the standard it used throughout the last decade, its decisions have come to more closely resemble those of other states and the federal system.

The irony in this development is that the standard of review, which because of its historical focus would appear to dictate traditionalist results, in fact led to the more groundbreaking decisions in Indiana constitutional jurisprudence. The Indiana Court of Appeals’ attempt to follow that standard in *Gerschoffer* and *Linke* dictated results more restrictive of governmental conduct (based on traditional antipathy by Indiana citizens toward law enforcement discretion) and out of line with federal jurisprudence.

Indiana’s courts have had a freer hand to apply the standard of review outside

238. *Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2001); *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002).

239. *Gerschoffer*, 763 N.E.2d at 966; *Linke*, 736 N.E.2d 972, 976.

240. 778 N.E.2d 1264, 1268 (Ind. 2002).

241. *Id.* at 1270-71.

242. *Id.* at 1273-75 (Boehm, J., dissenting).

243. See *Bayh v. Sonnenburg*, 573 N.E.2d 398, 412 (Ind. 1991) (“[I]n placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy.”) (quoting *State v. Gibson*, 36 Ind. 389, 391 (1871); see also *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 298 (Ind. 1994) (“This Court analyzes questions arising under the Indiana Constitution by examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.”). The most complete statement of the standard is quoted *supra* note 37.

the area of individual rights, which already has been the subject of extensive litigation in the federal arena.²⁴⁴ These constitutional provisions outside the individual rights area, including Indiana's strict separation of powers provision and other terms governing the operation of state government, have been the primary source of significant developments since the *Second Wind* article.²⁴⁵

The greatest impact of the Indiana Constitution on Indiana citizens has actually occurred by decisions applying later articles, particularly articles III through X, provisions governing the operation of government and its branches. Undoubtedly, the most immediately significant case for everyday citizens outside article I is the case now known as *Town of St. John v. Department of Local Government Finance*,²⁴⁶ litigation that has led to a revolution in Indiana's property tax administration.

The Indiana Supreme Court declared in *Town of St. John* that Indiana's method for measuring property values for taxation purposes, a method that had been used for decades, violated the requirements of uniformity and equality in article X.²⁴⁷ This decision led to adoption of entirely new rules for assessing property.²⁴⁸ Those rules are now being applied to revalue all of the three million parcels of real estate subject to property taxation in Indiana, likely leading to significant redistribution of the property tax burden.²⁴⁹

Fears about the effects of the application of the new valuation rules led the

244. The portions of article I that lack federal analogues, including the "open courts" and remedies provisions and article I, section 19, have also not been the source of extensive rights beyond those found in the Federal Constitution. Thus, it may be that the mere fact that there is no analogous federal provision is insufficient in itself to be outcome determinative. Analysis of this question is beyond the scope of this article.

245. See Shepard, *supra* note 1.

246. State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657 (Ind. 2001) (limited to question of attorneys' fees); Town of St. John v. State Bd. of Tax Comm'rs, 729 N.E.2d 242 (Ind. Tax Ct. 2000); State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034; Town of St. John v. State Bd. of Tax Comm'rs, 695 N.E.2d 123 (Ind. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 698 N.E.2d 399 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 691 N.E.2d 1387 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 690 N.E.2d 370 (Ind. Tax Ct. 1997); Boehm v. Town of St. John, 675 N.E.2d 318 (Ind. 1996); Town of St. John v. State Bd. of Tax Comm'rs, 665 N.E.2d 965 (Ind. Tax Ct. 1996); Bielski v. Zorn, 627 N.E.2d 880 (Ind. Tax Ct. 1994).

247. *Town of St. John*, 702 N.E.2d at 1038-43.

248. Compare Ind. Admin. Code tit. 50, art. 4.2 (2001) (repealed rules), with Ind. Admin. Code tit. 50, art. 4.3 (2002) (new rules).

249. Editorial, *Tax and Revenue Bills Vital to Indiana*, SOUTH BEND TRIB., Jan. 11, 2002, at A6. The Fair Market Value Study cited by the Indiana Supreme Court showed that different classes of property were valued at vastly different levels in relation to their market values. *Town of St. John*, 702 N.E.2d at 1042 (showing residential property valued at 62% of market; industrial at 72%; agricultural at 54%; and commercial at 81%). Valuing each type of property at the same proportion of market value will redistribute the tax burden significantly.

General Assembly to restructure Indiana's entire tax system in 2002.²⁵⁰ The resulting system raises less revenue from property taxes and more from the sales tax.²⁵¹ Because tax restructuring was, in major part, an outgrowth of the *Town of St. John* decision, the decision and its implications should be considered the most important development in state constitutional law in 2002.

Town of St. John is not the only case dealing with the structure and function of Indiana government that has had major significance for citizens over the past few years. Over the past decade, much important law also has been made under the Indiana Constitution outside the realm of individual rights. The Indiana Supreme Court has decided important cases regarding the scope of legislative power,²⁵² governmental duties to provide certain services,²⁵³ legislative authority over the judicial branch,²⁵⁴ and the Indiana Court of Appeals has decided an important case regarding the Governor's authority.²⁵⁵ In the upcoming months, the Indiana Supreme Court has on its docket other cases concerning the structural provisions of the Indiana Constitution, including cases addressing special laws and the Uniform and Equal Taxation Clause.²⁵⁶

CONCLUSION

Contrary to the tone set by the chief justice's article in 1989, the Indiana Constitution has not been the source of significant individual rights protections in the intervening years. Rather, the Indiana Supreme Court has developed some different modes of analysis, but citizens' rights under the Indiana Constitution remain only marginally different than their rights under the Federal Constitution.²⁵⁷ There remains, of course, significant unexplored territory in

250. Elizabeth Garvin, *Indiana Lawmakers Restructure, Increase Taxes to Take Heat Off Homeowners*, THE BOND BUYER, June 25, 2002, at 4.

251. Pub. L. No. 192-2002 (Special Session).

252. See *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996); *Pence v. State*, 652 N.E.2d 486 (Ind. 1995); *Ind. Gaming Comm'n v. Moseley*, 643 N.E.2d 296 (Ind. 1994).

253. *Ratliff v. Cohn*, 693 N.E.2d 530 (Ind. 1998). See also *Y.A. by Fleener v. Bayh*, 657 N.E.2d 410 (Ind. Ct. App. 1995) (court of appeals decision on similar issue).

254. *State v. Monfort*, 723 N.E.2d 407 (Ind. 2000).

255. *Nass v. State ex rel. Unity Team*, 718 N.E.2d 757 (Ind. Ct. App. 1999).

256. *City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003); *Dep't of Local Gov't Fin. v. Griffin*, 748 N.E.2d 448 (Ind. 2003). Discussion of these cases is beyond the scope of this Article because the cases were decided after the Article was drafted, but before it went to press.

257. Although outcomes under article I resemble those under the Federal Constitution, the analytical frameworks to reach those results sometimes differ. In the search and seizure area, for example, Indiana looks only at reasonableness of police conduct while federal courts analyze reasonable expectations of privacy. Compare *Linke v. Northwestern Sch. Corp.*, 763 N.E.2d at 978 (examining reasonableness of police conduct), with *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (examining reasonable expectation of privacy). As Chief Justice Shepard has suggested, these alternative analytical frameworks also protect rights. Should either approach erode as case law develops, the other remains as independent protection of the right. See generally Randall T.

article I of the Indiana Constitution,²⁵⁸ and the future of individual rights under article I remains to be seen.

In contrast, Indiana courts have not been reticent to use the constitutional principles governing the functioning of state government to break new and important ground. *Town of St. John* also excellently illustrates the principle that Indiana citizens' daily lives are appreciably affected by decisions applying the Indiana Constitution even when those decisions do not apply the provisions of article I. The taxation sections of article X only regulate governmental conduct, not individual behavior, yet *Town of St. John* had a direct affect on every citizen's daily life, whether as a property taxpayer, sales taxpayer, or consumer of the myriad of services from education to highways that were affected by tax restructuring. Similarly, the other structural cases decided by the courts over the past decade, including the important cases on taxation and legislative power now before the supreme court, have a crucial affect on the daily lives of Indiana's citizens.

Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U. L. REV. 421, 456 (1996).

258. For example, the religion sections and the free expression section remain largely undeveloped.

RECENT DEVELOPMENTS IN INDIANA CONSUMER LAW

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INTRODUCTION

This Article divides recent, significant developments that affect Indiana consumers into four major topics. Part I focuses on debtor-creditor relations; specifically, the “payday loan” industry and the interaction between Indiana civil procedure and the federal Fair Debt Collection Practices Act. Part II examines Indiana statutes regarding deceptive and unconscionable practices in the contexts of the sale of recalled products and software pricing. Part III discusses the issue of fuel price gouging. Finally, Part IV covers new legislation affecting residential tenants and landlords.

I. CREDITORS AND DEBTORS

A. Payday Loans

The Indiana General Assembly enacted legislation that effectively overruled the *Livingston v. Fast Cash USA, Inc.*¹ decision handed down by the Indiana Supreme Court during the previous Survey period. In *Livingston*, the court held that “payday loans” were subject to a statutory maximum annual percentage interest rate (“APR”) of 36%, notwithstanding another provision in the same statute that allows for a minimum finance charge of \$30.00 (indexed for inflation).²

The *Livingston* court explained the procedure of payday loans:

The borrower applies for a small loan and gives the lender a post-dated check in the amount of the loan principal plus a finance charge. Depending on the lender, the finance charge varies from \$15 to \$33. In return, the lender gives the borrower a loan in cash with payment due in a short period of time, usually two weeks. When the loan becomes due, the borrower either repays the lender in cash the amount of the loan plus the finance charge, or the lender deposits the borrower's check. If the borrower lacks sufficient funds to pay the loan when due, then the borrower may obtain a new loan for another two weeks incurring another finance charge.³

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1. 753 N.E.2d 572 (Ind. 2001).

2. *Id.* at 574, 575 & n.4, 577 (citing IND. CODE § 24-4.5-3-508 (1998)); see also Matthew T. Albaugh, *Indiana's Revised Article 9 and Other Developments in Commercial and Consumer Law*, 35 IND. L. REV. 1239, 1249-55 (2002).

3. 753 N.E.2d at 574.

The new legislation,⁴ which uses the term “small loans” to describe payday loans,⁵ provides that payday loan lenders may impose a 15% finance charge on the first \$100.00 of the loan and 10% on the portion of the loan exceeding \$100.00, subject to a maximum finance charge of \$35.00.⁶ Under this legislation, payday loans are exempt from the maximum APR and minimum finance charge statutory provisions that were at issue in *Livingston*.⁷

While these provisions may seem to favor the payday loan industry at the expense of consumers, the same legislation also provides consumers with some protections. For example, payday lenders must warn borrowers that such loans are “not intended to meet long term financial needs” and that the finance charges may exceed those associated with other types of loans.⁸ If a borrower renews a payday loan three times, “another small loan may not be made to that consumer within seven (7) days after the date of the third consecutive small loan unless the new small loan is for a term of twenty-eight (28) days or longer.”⁹ Furthermore, a payday loan may not be made “if the total payable amount of the small loan exceeds twenty percent (20%) of the consumer's monthly net income,”¹⁰ and payday lenders may not issue loans to consumers who: a) already have an outstanding loan with the same lender; b) have one outstanding payday loan with another lender, if the total of the loans (including finance charges) exceeds \$400.00; or c) already have two outstanding payday loans.¹¹

Additional consumer protections in the payday loan legislation include prohibitions on, among other things: a) threatening criminal prosecution to collect an overdue payday loan; b) “[c]ontracting for and collecting attorney's fees on [payday] loans”; c) payday loan agreements containing hold harmless

4. See Act of Mar. 14, 2002, Pub. L. 38-2002, 2002 Ind. Acts 779 (codified at IND. CODE §§ 24-4.5-7-101 to -414 (Supp. 2002)).

5. See IND. CODE § 24-4.5-7-104 (Supp. 2002) (“‘Small loan’ means a loan: (a) with a principal loan amount that is more than fifty dollars (\$50) and less than four hundred one dollars (\$401); and (b) in which the lender holds the borrower's check under an agreement, either express or implied, for a specific period before the lender: (i) offers the check for deposit or presentment; or (ii) seeks authorization to transfer or withdraw funds from the borrower's account.”).

6. *Id.* § 24-4.5-7-202.

7. See *id.* § 24-4.5-7-411 (Supp. 2002) (“Finance charges made in compliance with this chapter are exempt from IC 24-4.5-3-508 and IC 35-45-7.”). The latter statutory reference refers to the crime of loansharking. See IND. CODE § 35-45-7-2 (1998) (“A person who, in exchange for the loan of any property, knowingly or intentionally receives or contracts to receive from another person any consideration, at a rate greater than two (2) times the rate specified in IC 24-4.5-3-508(2)(a)(i), commits loansharking, a Class D felony. However, loansharking is a Class C felony if force or the threat of force is used to collect or to attempt to collect any of the property loaned or any of the consideration for the loan.”).

8. IND. CODE § 24-4.5-7-301(2)-(3) (Supp. 2002).

9. *Id.* § 24-4.5-7-401(2).

10. *Id.* § 24-4.5-7-402(1).

11. *Id.* § 24-4.5-7-404(1)-(2).

clauses, confession of judgment clauses, or waivers of the protections provided by the new payday loan statutes.¹² The legislation also contains general provisions barring payday lenders from “[m]aking a misleading or deceptive statement” or “[e]ngaging in unfair, deceptive, or fraudulent practices.”¹³

B. Debt Collection

Two cases from the United States District Court for the Southern District of Indiana examined the interaction between the federal Fair Debt Collection Practices Act¹⁴ (“FDCPA”) and Indiana law. In the first case, *Frye v. Bowman, Heintz, Boscia & Vician, P.C.*,¹⁵ defendants in an Indiana state court debt collection lawsuit filed a federal class action against opposing counsel. The Fries claimed that the summons served upon them violated several provisions of the FDCPA. Specifically, they objected to the following language:

a) “You must either personally or by your attorney file your written answer to the COMPLAINT within twenty (20) days commencing the day after this summons and the complaint were personally served upon you or your agent”¹⁶

b) “However, if you or your agent first received the SUMMONS and the COMPLAINT by certified mail, you have twenty-three (23) days from the date of receipt to file your written answer with the Clerk.”¹⁷

c) “If you fail to answer the COMPLAINT of the Plaintiff within the times prescribed herein, judgment will be entered against you for what the Plaintiff has demanded.”¹⁸

d) “If you have a claim against the Plaintiff arising from the same transaction or occurrence, you may be required to assert such claim in writing together with your written answer.”¹⁹

For the most part, the Fries’ objections seemed rather trivial; the court described the case as a “test of minute violations of the FDCPA.”²⁰ Specifically, the Fries took issue with the summons because:

a) The summons indicated that the Fries had twenty-three days after “receipt” of the summons and complaint by certified mail to respond, rather than twenty-three days after mailing, which is the deadline under the Indiana Trial Rules.²¹

12. *Id.* § 24-4.5-7-410.

13. *Id.* § 24-4.5-7-410(c), (g).

14. 15 U.S.C. §§ 1692-1692o (2000).

15. 193 F. Supp. 2d 1070 (S.D. Ind. 2002).

16. *Id.* at 1075.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1089.

21. *Id.* at 1077-78.

b) The summons stated that the Fries were required to file an "answer," yet the Trial Rules allow defendants to file various pre-answer motions in lieu of an answer.²²

c) The summons warned that default judgment "will be entered" if the Fries did not respond before the deadline, even though default judgment is within the discretion of the trial court.²³

d) The summons contended that the Fries "may be" required to assert any counterclaims "arising from the same transaction or occurrence," yet in most situations, such counterclaims will be mandatory.²⁴

Initially, the court seemed unimpressed with these contentions. The court suggested that under the Seventh Circuit's "unsophisticated debtor" standard,²⁵ the word "answer" should be interpreted broadly enough to encompass any permissible response to the complaint, including pre-answer motions, and not just an "answer" in the more narrow sense contemplated by Indiana Trial Rule 7(A).²⁶ Furthermore, the Fries' strategy of interpreting the summons in its most literal sense possibly backfired when the court pointed out that the Trial Rules explicitly state that an otherwise-mandatory counterclaim need not be contained in an answer when, *inter alia*, the counterclaim has already been asserted in a different action or the court is unable to obtain personal jurisdiction over a third party who must be present for the court to resolve the counterclaim.²⁷

The court did concede that the summons in the state court case was inaccurate to the extent that it misstated the deadline for responding after certified mail service and asserted that default judgment "will" rather than "may" be entered had the Fries failed to respond.²⁸ Even then, the court noted that it was "troubled" because the Fries, in initiating the FDCPA class action, also used a summons inaccurately stating that default judgment "will be taken" in the event of a failure to respond.²⁹

22. *Id.* at 1078. The court also noted that in some cases, the defendant will also have the option of invoking federal diversity jurisdiction and removing the case out of state court. *Id.* at 1078 n.4.

23. *Id.* at 1079 & n.6.

24. *Id.* at 1079.

25. "The 'unsophisticated debtor' is uneducated, uninformed, naive, and trusting." *Id.* at 1077. While the unsophisticated debtor standard "is low, close to the bottom of the sophistication meter," *id.* (quoting *Avila v. Rubin*, 84 F.3d 222, 226 (7th Cir. 1996)), the standard does contain "an objective element of reasonableness in the standard which protects debt collectors from liability for 'unrealistic or peculiar interpretations of collection letters,'" *id.* (quoting *Gammon v. GC Servs. Ltd.*, 27 F.3d 1254, 1257 (7th Cir. 1994)).

26. *Id.* at 1078-79.

27. *Id.* at 1079.

28. *Id.* at 1077-79 & n.6.

29. *Id.* at 1079-80. Apparently the court was not too concerned about the language itself; as the court recognized, both its own website and an appendix to the Federal Rules of Civil Procedure provide form summonses containing the same language. *See id.* at 1080. Rather, the court seemed

Nonetheless, the court proceeded to analyze the Fries' claims under the FDCPA. As for the claim that the summons violated the FDCPA's ban on harassing or abusive conduct,³⁰ the court rejected it because the summons would not "harass, oppress or abuse any person" and was "not obscene, profane or offensive in the least"; to the contrary, it was "reasonable and civil."³¹ Likewise, the court declined to find that the summons violated the provision of the FDCPA prohibiting "unfair or unconscionable means" in the debt collection process:³² "It seems strange to suggest that the use of language consistent with that used in forms of summons available from state court clerks' offices is unfair or unconscionable."³³

As for the Fries' claim that the summons violated the FDCPA's prohibition on "any false, deceptive, or misleading representation or means,"³⁴ the Fries argued that the statements at issue were "literally false," and hence, the unsophisticated debtor standard should not apply.³⁵ However, the court found that only the portion of the summons regarding the deadline for replying via certified mail was literally false; the other statements at issue "were not literally false" and merely "may have had the potential to mislead or deceive."³⁶ Because the Fries failed to introduce any evidence that an unsophisticated debtor would be misled by the potentially misleading statements, the court rejected this claim, except with respect to the "literally false" statement concerning the deadline for replying after service by certified mail.³⁷

The Fries also asserted that the summons violated the provision of the FDCPA that deems it

unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.³⁸

However, the court quickly disposed of this claim by noting that the Fries did not furnish any evidence in support of the claim. The court went on to say that it was "at a loss as to how this provision would apply to the Fries' claims. Surely, they are not suggesting that Bowman's use of the Summonses was an effort to create the false belief that the Madison County Superior Court was participating in the

bothered by the Fries' inconsistency, even though it recognized that the form of the summons used by the Fries was "not at issue." *Id.* at 1079.

30. See 15 U.S.C. § 1692d (2000).

31. *Frye*, 193 F. Supp. 2d at 1081-83.

32. 15 U.S.C. § 1692f.

33. *Frye*, 193 F. Supp. 2d at 1082 n.10.

34. *Id.* at 1083 (quoting 15 U.S.C. § 1692e).

35. *Id.* at 1083-84. The unsophisticated debtor standard is discussed *supra* note 25.

36. *Frye*, 193 F. Supp. 2d at 1084.

37. *Id.*

38. *Id.* (quoting 15 U.S.C. § 1692j(a)).

collection of the debt.”³⁹

Ultimately, the Fries were left with only one viable FDCPA claim, i.e., that the summons violated the prohibition on false statements by asserting that they had twenty-three days after receipt to respond if service was made via certified mail, when the correct deadline is twenty-three days after mailing. The court then invoked the “bona fide error defense” to reject this claim.⁴⁰ This defense shields a debt collector from FDCPA liability if it “shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”⁴¹

After noting that the form summonses provided by many Indiana state courts contain the same errors at issue in the *Frye* case, the court found that the defendant law firm presented uncontested evidence that the violation was unintentional and that the law firm had “in place procedures reasonably designed to avoid errors in summonses that could result in FDCPA violations and, moreover, those procedures were followed in the state court lawsuit filed against the Fries.”⁴² Accordingly, the court entered summary judgment in favor of the law firm on all claims.⁴³

The second case, *Wehrheim v. James M. Secrest, P.C.*,⁴⁴ considered the question of whether a claim of criminal deception as defined in Indiana Code section 35-43-5-3(a)⁴⁵ is preempted when a debtor alleges that a collector violated the FDCPA by trying to collect a debt already discharged in bankruptcy.⁴⁶ The court’s answer was “yes.” After deciding that any FDCPA claim was preempted by the Bankruptcy Code,⁴⁷ the court went further and determined that the state law deception claim was also preempted, and that the debtor’s only recourse was to initiate a contempt proceeding in bankruptcy court under the Bankruptcy Code.⁴⁸

39. *Id.*

40. *See id.* at 1089.

41. 15 U.S.C. § 1692k(c).

42. *Frye*, 193 F. Supp. 2d at 1088. Those procedures included: a) The creation and use of a manual on FDCPA compliance; b) educational seminars on the FDCPA; c) the use of language from court-provided summons forms; and d) before the firm commenced suit, an attorney would review the entire file and, inter alia, ensure that the summons was in line with the form summons provided by the court where the case was to be filed. *Id.* at 1076.

43. *Id.* at 1089.

44. No. IP 00-1328-C T/K, 2002 WL 31242783 (S.D. Ind. Aug. 16, 2002).

45. IND. CODE § 35-43-5-3(a)(2) (1998) (“A person who . . . knowingly or intentionally makes a false or misleading written statement with intent to obtain property . . . commits deception, a Class A misdemeanor.”).

46. *Wehrheim*, 2002 WL 31242783 at *10.

47. *Id.* at *9. The *Wehrheim* court noted that “courts are divided on this issue.” *Id.* at *6.

48. *Id.* at *10. Under the Bankruptcy Code, a discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset [the] debt as a personal liability of the debtor.” 11 U.S.C. § 524(a)(2) (2000).

II. DECEPTIVE AND UNCONSCIONABLE PRACTICES

A. Sales of Recalled Products

The Indiana General Assembly expanded the definition of “deceptive act” in the context of Indiana’s consumer protection statutes to include the sale of a recalled product that has not been appropriately fixed or modified.⁴⁹ This new statutory provision applies regardless of whether the product was recalled voluntarily or involuntarily.⁵⁰ However, “it is an affirmative defense . . . that the product has been altered by a person other than the defendant to render the product completely incapable of serving its original purpose.”⁵¹

B. Computer Software

In *Berghausen v. Microsoft Corp.*,⁵² the Indiana Court of Appeals affirmed the dismissal of an antitrust class action against Microsoft that also included consumer protection claims. After purchasing a copy of the Windows 98 operating system, Berghausen alleged, inter alia, that “Microsoft monopolized the market for computer operating systems and as a result he paid a monopoly price.”⁵³ Berghausen claimed that Microsoft violated Indiana consumer protection law by “implicitly represent[ing] to consumers that its prices were fair and competitive when in fact the prices were supra-competitive, monopolist prices that far exceeded the prices consumers would have paid if Microsoft had not engaged in the aforesaid conduct.”⁵⁴

Specifically, Berghausen first alleged that Microsoft violated the statutory prohibition against representing, in writing or orally, that a “specific price advantage exists as to such subject of a consumer transaction, if it does not and if the supplier knows or should reasonably know that it does not.”⁵⁵ However, the court quickly rejected this notion because Berghausen did not show that Microsoft made any written or oral representation, and he failed to explain how “implicit representations” were within the scope of the statute.⁵⁶

Berghausen also claimed that Microsoft violated the following statute:

A supplier commits an unconscionable act that shall be treated the same as a deceptive act under this chapter *if the supplier solicits a person to*

49. See Act of Mar. 20, 2002, Pub. L. 70-2002, 2002 Ind. Acts 933 (codified at IND. CODE § 24-5-0.5-3 (Supp. 2002)).

50. IND. CODE § 24-5-0.5-3(a)(18) (Supp. 2002).

51. *Id.* § 24-5-0.5-3(g).

52. 765 N.E.2d 592 (Ind. Ct. App. 2002), *trans. denied sub nom.* Branham v. Microsoft Corp., 783 N.E.2d 692 (Ind. 2002).

53. *Id.* at 593-94.

54. *Id.* at 598 (quoting Appellant’s Appendix at 18).

55. *Id.* (quoting IND. CODE § 24-5-0.5-3(a)(6)).

56. *Id.*

enter into a contract or agreement: (1) that contains terms that are oppressively one sided or harsh; (2) in which the terms unduly limit the person's remedies; or (3) in which the price is unduly excessive; and there was unequal bargaining power that led the person to enter into the contract or agreement unwillingly or without knowledge of the terms of the contract or agreement.⁵⁷

After noting that Berghausen waived this claim by failing to provide a supporting argument, the court went on to indicate that his complaint did not allege that Microsoft made any solicitation to contract.⁵⁸ Accordingly, the court of appeals upheld the trial court's dismissal.

III. FUEL PRICE GOUGING

In what many state attorneys general saw as blatant price gouging, some retailers drastically increased their gasoline prices during the panic that occurred after the terrorist attacks of September 11, 2001.⁵⁹ The Indiana General Assembly responded by enacting legislation specifically aimed at fuel price gouging.⁶⁰ "Price gouging," for purposes of the new statutes, is defined as "charging a consumer an unconscionable amount for the sale of fuel"⁶¹ when a state of emergency has been declared by the governor, or within twenty-four hours before the declaration.⁶² The legislation further provides,

Price gouging occurs if: (1) the amount charged grossly exceeds the average price at which fuel was readily obtainable within the retailer's trade area during the seven (7) days immediately before the declaration of emergency; and (2) the increase in the amount charged is not attributable to cost factors to the retailer, including replacement costs,

57. *Id.* at 598-99 (quoting IND. CODE § 24-5-0.5-10(b) (1998)) (emphasis by court).

58. *Id.* at 599.

59. See Nat'l Ass'n of Att'ys Gen., *NAAG Projects: Consumer Protection*, at <http://www.naag.org/issues/issue-consumer.php> (2001) (noting that some sellers "raised gas prices by 300%").

60. See Act of Mar. 26, 2002, Pub. L. 124-2002, 2002 Ind. Acts 1885 (codified at IND. CODE §§ 4-6-9.1-1 to -7 (Supp. 2002)).

61. IND. CODE § 4-6-9.1-2.

62. *Id.* § 4-6-9.1-1(a) (dictating that the price gouging statutes "apply to the period during which an emergency is declared and the twenty-four (24) hours before the declaration by the governor under IC 10-4-1-7 or IC 10-4-1-7.1"). The latter of the cited statutes allows the governor to declare an "energy emergency." IND. CODE § 10-4-1-7.1(a)(1) (1998) ("The governor may, upon finding that an energy emergency exists, proclaim a state of energy emergency at which time all of the general and specific emergency powers further enumerated in this section and section 7.2 of this chapter become effective."). An energy emergency is defined as "an existing or projected shortfall of at least eight percent (8%) of motor fuel or of other energy sources which threatens to seriously disrupt or diminish energy supplies to the extent that life, health, or property may be jeopardized." *Id.* § 10-4-1-3.

taxes, and transportation costs incurred by the retailer.⁶³

The fuel price gouging legislation empowers the attorney general to take three kinds of action against offenders. First, the attorney general may seek an injunction.⁶⁴ Second, the attorney general may “seek restitution for victims of price gouging.”⁶⁵ Third, the attorney general may initiate a civil action against a price-gouging retailer to impose a penalty of up to \$1000.00 “per transaction.”⁶⁶

IV. LANDLORD-TENANT RELATIONS

In the last few decades, Indiana courts have indicated a willingness to find “an implied warranty of habitability in the context of residential leases.”⁶⁷ However, as recently as January 2002, the Indiana Court of Appeals stated that “an implied warranty of habitability is not imposed by law on every residential lease contract.”⁶⁸

Such is no longer the case. Since then, the Indiana General Assembly has enacted legislation that effectively implies a warranty of habitability on leases made after June 30, 2002.⁶⁹ Under this legislation, a landlord is obligated to:

(1) Deliver the rental premises to a tenant in compliance with the rental agreement, and in a safe, clean, and habitable condition.

(2) Comply with all health and housing codes applicable to the rental premises.

(3) Make all reasonable efforts to keep common areas of a rental premises in a clean and proper condition.

(4) Provide and maintain the following items in a rental premises in good and safe working condition, if provided on the premises at the time the rental agreement is entered into:

(A) Electrical systems.

(B) Plumbing systems sufficient to accommodate a reasonable

63. IND. CODE § 4-6-9.1-2 (Supp. 2002).

64. *Id.* § 4-6-9.1-3.

65. *Id.*

66. *Id.* §§ 4-6-9.1-3, -5.

67. *Schuman v. Kobets*, 760 N.E.2d 682, 684-85 (Ind. Ct. App. 2002), *trans. denied*, 774 N.E.2d 515 (Ind. 2002).

68. *Id.* at 685.

69. *See* Act of Mar. 21, 2002, Pub. L. 92-2002, 2002 Ind. Acts 1540 (codified at IND. CODE §§ 32-31-7-1 to -7, 32-31-8-1 to -6 (Supp. 2002)); *see also* WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 6.38, at 299 (3d ed. 2000) (recognizing the parallel between statutes imposing habitability requirements and judicially-imposed implied warranties of habitability).

supply of hot and cold running water at all times.

(C) Sanitary systems.

(D) Heating, ventilating, and air conditioning systems. A heating system must be sufficient to adequately supply heat at all times.

(E) Elevators, if provided.

(F) Appliances supplied as an inducement to the rental agreement.⁷⁰

If the tenant notifies the landlord of a violation and the landlord does not bring the premises into compliance, the tenant may bring an action to obtain actual and consequential damages, an injunction, attorney fees, costs, and "[a]ny other remedy appropriate under the circumstances."⁷¹

However, in exchange for these statutory rights, tenants must live up to certain responsibilities. Tenants must:

(1) Comply with all obligations imposed primarily on a tenant by applicable provisions of health and housing codes.

(2) Keep the areas of the rental premises occupied or used by the tenant reasonably clean.

(3) Use the following in a reasonable manner:

(A) Electrical systems.

(B) Plumbing.

(C) Sanitary systems.

(D) Heating, ventilating, and air conditioning systems.

(E) Elevators, if provided.

(F) Facilities and appliances of the rental premises.

(4) Refrain from defacing, damaging, destroying, impairing, or removing any part of the rental premises.

(5) Comply with all reasonable rules and regulations in existence at the time a rental agreement is entered into. A tenant shall also comply with amended rules and regulations as provided in the rental agreement.⁷²

Furthermore, when the tenancy ends, "the tenant shall deliver the rental premises to the landlord in a clean and proper condition, excepting ordinary wear and tear expected in the normal course of habitation of a dwelling unit."⁷³

Like tenants, landlords are authorized to bring an action to enforce the

70. IND. CODE § 32-31-8-5. "A waiver . . . by a landlord or tenant, by contract or otherwise, is void." *Id.* § 32-31-8-4.

71. *Id.* § 32-31-8-6(d)(3).

72. *Id.* § 32-31-7-5.

73. *Id.* § 32-31-7-6.

statutory obligations and may recover attorney fees if they prevail.⁷⁴ However, the landlord generally must first notify the tenant of the violation and give the tenant “a reasonable amount of time to remedy the noncompliance” before filing a lawsuit.⁷⁵

CONCLUSION

Developments in Indiana consumer law during the Survey period were relatively few in number. Indeed, the most significant recent development may have been the new landlord-tenant statutes—something that one might consider outside the scope of “consumer law.”⁷⁶ Nonetheless, the legislation enacted during the Survey period suggests that the General Assembly is working to remedy Indiana’s reputation as a consumer-unfriendly state.⁷⁷

74. *Id.* § 32-31-7-7.

75. *Id.*

76. For example, the West Group’s Key Number System seems to view consumer law as consisting of “consumer credit” and “consumer protection” matters. WEST’S ANALYSIS OF AMERICAN LAW 290, 292 (2002 ed.). Other matters of relevance to consumers are classified under areas of the law such as “contracts,” “credit reporting agencies,” “products liability,” and “sales.” *Id.* at 291-92.

77. See James P. Nehf, *Consumer Transactions: Movement Toward a More Progressive Approach*, 34 IND. L. REV. 599, 599 (2001) (commenting that “Indiana continues to be a state in which consumer rights are not aggressively protected by statute or court decisions when compared with the progressive consumer movements in other states”).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

The General Assembly and Indiana's appellate courts confronted new issues and revisited old ones during the survey period. Rather than separating the efforts of each branch of government, this Article takes a topical approach to exploring some of the most significant developments between October 1, 2001, and September 30, 2002.

The bookends—arguably the most significant issues this year—are the death penalty and appellate sentence review. The Article begins with the death penalty issue, in which both the General Assembly and the Indiana Supreme Court took fairly bold action in light of recent United States Supreme Court developments. The Article then explores in less depth other issues both of old vintage, such as double jeopardy, jury instructions, and double enhancements, as well as new issues such as Internet child solicitation and anti-terrorism legislation. The Article concludes, as it has for the past two years, with a discussion of the far-reaching and evolving issue of appellate sentence review.

I. DEATH PENALTY DISARRAY IN INDIANA

The United States Supreme Court's death penalty jurisprudence in the 2002 term was arguably the most significant since the death penalty was found unconstitutional three decades ago in *Furman v. Georgia*.¹ In *Atkins v. Virginia*,² the Court held that the Eighth Amendment prohibited the execution of mentally retarded individuals. That decision had no practical effect in Indiana or the majority of other states that had already banned execution of mentally retarded individuals.³ Indeed, the Indiana amendment predated *Atkins* by eight years.⁴

Much farther reaching, however, was the boost to the role of juries in capital sentencing as the result of the Supreme Court's opinion in *Ring v. Arizona*⁵ and the 2002 amendments to the Indiana death penalty statute that seemingly anticipated it. Since its adoption in 1977, the Indiana death penalty statute has required the State to prove at least one of the delineated aggravating factors for the imposition of the death penalty; however, it expressly limited the jury's role to making a non-binding "recommendation" to the trial court and allowed the trial court to make the ultimate decision regarding the sentence to impose.⁶

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1. 408 U.S. 238 (1972).

2. 536 U.S. 304 (2002).

3. *Id.* at 314-15.

4. See IND. CODE § 35-36-9-6 (Supp. 1994).

5. 536 U.S. 584 (2002).

6. IND. CODE § 35-50-2-9(d) & (e) (1998).

A. Presaging Ring

In 2000, the United States Supreme Court held in *Apprendi v. New Jersey*⁷ that “[o]ther than the fact of a prior conviction, any facts that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁸ Although *Apprendi* addressed an enhancement to a term of years sentence based on the defendant’s use of a handgun, its impact on capital sentencing became an immediate topic of discussion throughout the nation. Specifically, the Court would have to address the continued viability of its seemingly conflicting 1990 opinion, *Walton v. Arizona*,⁹ which had upheld the power of judges to find an aggravating circumstance to support the imposition of a death sentence. The wait was a short one, as the Supreme Court granted certiorari and set *Ring v. Arizona* for oral argument on April 24, 2002.

In anticipation of the Supreme Court’s opinion in *Ring*, the General Assembly and the Indiana Supreme Court took fairly bold but divergent action. The General Assembly amended the death penalty statute to provide that trial courts “shall instruct the jury that they must find at least one aggravating circumstance beyond a reasonable doubt and shall provide a special verdict form for each aggravating circumstance alleged.”¹⁰ The statute was further amended to provide “[i]f the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly,” while retaining the long-standing language that allowed the trial court to “proceed as if the hearing had been to the court alone” if the jury was unable to reach a unanimous sentencing recommendation.¹¹

With this backdrop of legislative action to address future cases and in wake of speculation about how the Supreme Court might affect pending ones under *Ring*, the Indiana Supreme Court issued opinions in two death penalty opinions while *Ring* was pending. First, on March 20, the court upheld the denial of post-conviction relief in a death penalty case in *Saylor v. State*.¹² A month later, relying heavily on *Saylor*, the court reversed a trial court’s dismissal of a death penalty count based on a facial challenge to the statute on *Apprendi* grounds in *Barker v. State*.¹³

In 1992 Benny Saylor was convicted of murder, felony murder, robbery, and confinement in the stabbing death of a Madison County woman.¹⁴ Although the jury recommended against the imposition of death, the trial court overrode the recommendation and sentenced him to death, which was affirmed on direct

7. 530 U.S. 466 (2000).

8. *Id.* at 490.

9. 497 U.S. 639 (1990).

10. IND. CODE § 35-50-2-9(d) (Supp. 2002).

11. *Id.* § 35-50-2-9(f) (1998).

12. 765 N.E.2d 535 (Ind. 2002).

13. 768 N.E.2d 425 (Ind. 2002).

14. *Saylor*, 765 N.E.2d at 544.

appeal.¹⁵ He raised several issues in a petition for post-conviction relief, which was denied by the trial court and then automatically appealed to the Indiana Supreme Court.¹⁶ Among the issues addressed in the post-conviction appeal was the effect of *Apprendi* on Indiana's death penalty statute in general and Saylor's death sentence in particular.

In an opinion written by Justice Rucker and joined by Chief Justice Shepard and Justice Dickson, the court found no constitutional infirmity in the statute or Saylor's sentence.¹⁷ The court began by acknowledging *Apprendi*'s holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹⁸ However, the court found no *Apprendi* violation for two reasons. First, the court noted that *Apprendi* had not overruled *Walton v. Arizona*,¹⁹ which addressed a sentencing scheme similar to Indiana's. In Arizona, the trial judge finds the existence of aggravating and mitigating circumstances and can impose a sentence of death only if it finds the existence of an aggravating circumstance and no mitigating circumstances substantial enough to warrant leniency.²⁰ The Court in *Walton* upheld the statute, finding it was well settled that judges—rather than juries—may find the existence of an aggravating circumstance that renders a defendant eligible for a death sentence.²¹ In *Apprendi*, the Court specifically cited *Walton*, seemingly with approval, although a concurring and dissenting opinion suggested that *Walton* would have to be revisited,²² at a minimum, if it had not been effectively overruled.²³ Nevertheless, the Indiana Supreme Court in *Saylor* concluded "in light of *Walton*, Saylor's *Apprendi*-based challenge to Indiana death penalty statute must fail."²⁴

In addition to its reliance on *Walton*, the supreme court found Saylor's challenge unavailing based on its construction of Indiana's death penalty statute. It noted that the statutory maximum for the crime in *Apprendi* was ten years and a "totally separate statute" provided for an "extended term of imprisonment" based on a trial court finding that a defendant committed a hate crime.²⁵ In contrast, the court found that Indiana's sentencing scheme for murder "provides that the maximum sentence is death."²⁶ It reached this seemingly strained conclusion by looking not only to the term of years sentence provided for by Indiana Code section 35-50-2-3, but also the death penalty provision found in

15. *Id.* (citing *Saylor v. State*, 686 N.E.2d 80 (Ind. 1997)).

16. *See* IND. APP. R. 4(A).

17. *Saylor*, 765 N.E.2d at 562-64.

18. *Id.* at 562 (quoting *Apprendi*, 530 U.S. at 490).

19. 497 U.S. 639 (1990).

20. *Saylor*, 765 N.E.2d at 562 (citing *Walton*, 497 U.S. at 644).

21. *Id.* at 563 (citing *Walton*, 497 U.S. at 647-48).

22. *Apprendi*, 530 U.S. at 523.

23. *Id.* at 538.

24. *Saylor*, 765 N.E.2d at 563.

25. *Id.* at 564 (citing *Apprendi*, 530 U.S. at 468-69).

26. *Id.*

section nine.²⁷ It reasoned that "when construing a statute, all sections of the same act should be viewed together."²⁸

Justice Boehm wrote an opinion concurring in the result reached by the majority. First, he questioned whether *Apprendi* would even apply because Saylor's appeal was from a collateral proceeding in light of the "new rule" doctrine of *Teague v. Lane*.²⁹ At least five federal circuit courts of appeal have held that *Apprendi* does not apply retroactively in initial petitions for habeas corpus.³⁰

However, the retroactivity issue did not need to be addressed in his view because Saylor was on probation at the time of the crime for which he received his death sentence. Justice Boehm opined that Saylor's probationary status caused him to fall within the *Apprendi* exception that excludes "the fact of a prior conviction" from those that must be found by a jury.³¹ "Both are established by judicial records and require none of the fact-finding we expect of a jury."³² For these reasons, Justice Boehm agreed that Saylor's death sentence should be affirmed.

Expressing the view that the trial court's override of the jury's recommendation against a death sentence violated *Apprendi*, Justice Sullivan dissented.³³ As an initial matter, like the majority he "assume[d] for purposes of this opinion that the holding in *Apprendi* is retroactive to Saylor's case."³⁴ Then, in his detailed opinion, Justice Sullivan opined that Indiana's death penalty statute is not facially unconstitutional but is unconstitutional in two instances: "where the jury recommends a term of years or makes no sentencing recommendation."³⁵

In those cases in which the jury has made a recommendation for death or life without parole, the trial court may, consistent with *Apprendi*, impose a death sentence because inherent in the jury's recommendation is a finding that the State has proven beyond a reasonable doubt the existence of at least one death penalty eligibility factor.³⁶ The imposition of a death sentence is also permissible when the jury has made written findings as to death eligibility (even if it recommends a term of years)³⁷ or in cases in which the jury's verdict in the guilt phase constitutes a finding of death eligibility.³⁸ A verdict of guilty to two or more murders is the paradigmatic example of a guilt phase verdict that also establishes

27. *See id.* at 564 (citing IND. CODE § 35-50-2-9(k)(1), (2)).

28. *Id.*

29. 489 U.S. 288 (1989).

30. *Saylor*, 765 N.E.2d at 568 (Boehm, J., concurring).

31. *Id.*

32. *Id.*

33. *Id.* at 568 (Sullivan, J., dissenting).

34. *Id.* at 569.

35. *Id.* at 574.

36. *Id.*

37. *Id.* at 575 (citing *Holsinger v. State*, 750 N.E.2d 354, 360 (Ind. 2001)).

38. *Id.* (citing *Pope v. State*, 737 N.E.2d 374, 381 (Ind. 2000)).

death eligibility under the capital sentencing statute.³⁹

In Justice Sullivan's view, *Apprendi* precludes the imposition of a death sentence for Saylor because the jury had recommended a term of years, had not made written eligibility findings, and its guilt phase verdict did not constitute an eligibility finding.⁴⁰ Accordingly, he would have reversed the denial of post-conviction relief and set aside Saylor's death sentence.⁴¹

Another death penalty case came quickly on the heels of *Saylor*, but it was easily resolved by a unanimous court. *State v. Barker*,⁴² unlike *Saylor*, was an appeal from a finding of facial unconstitutionality and was before the court on direct (interlocutory) rather than collateral review. In a per curiam opinion, the court simply stated, "We addressed the effect of *Apprendi* in *Saylor*, and concluded that Indiana death penalty statute remains constitutional."⁴³ The only possible light shed into the court's unanimous conclusion in *Barker*—as opposed to the fractured reasoning of its members in *Saylor*—comes from Justice Sullivan's dissent in *Saylor*:

I believe that *Apprendi* requires that a jury make a determination beyond a reasonable doubt that one or more of the death eligibility factors set forth in Ind. Code § 35-50-2-9 (b) have been proven beyond a reasonable doubt by the State in order for a person to be eligible to be sentenced to death in Indiana. However, I believe that in most circumstances the Indiana statute complies with the *Apprendi* mandate. For this reason, I disagree with the conclusion of Judge Hawkins in *State v. Barker*, that *Apprendi* renders Ind. Code § 35-50-2-9 (b) unconstitutional on its face.⁴⁴

B. The Main Event: *Ring v. Arizona*

Caught between a rock (*Apprendi*) and hard place (*Walton*), the Supreme Court aptly acknowledged that the two were irreconcilable in *Ring v. Arizona*⁴⁵ and chose to overrule *Walton*: "Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."⁴⁶

The Arizona statute at issue in *Ring* vested the trial judge with the sole responsibility of conducting a "separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the

39. See *id.* (citing IND. CODE § 35-50-2-9(b)(8)).

40. *Id.* at 576.

41. *Id.* at 577.

42. 768 N.E.2d 425 (Ind. 2002).

43. *Id.* at 426.

44. *Saylor*, 765 N.E.2d at 574 (Sullivan, J., dissenting) (internal citation removed).

45. 536 U.S. 584 (2002).

46. *Id.* at 589.

purpose of determining the sentence to be imposed.”⁴⁷ The maximum punishment for first-degree murder based on the jury’s verdict was life imprisonment, and the death sentence could be imposed only if one of these aggravating circumstances was proved beyond a reasonable doubt to the trial judge.⁴⁸ Because these enumerated factors “operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment required that they be found by a jury.”⁴⁹ In a final salvo, the Court reiterated the importance of the Sixth Amendment right to a jury trial, which would be “senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death.”⁵⁰

C. *The Aftermath of Ring*

The majority opinion in *Saylor* appears to be irreconcilable with *Ring*. *Saylor* filed a petition for rehearing, and the supreme court took the highly unusual step of hearing oral argument on the petition in November of 2002. By that time, the court had issued an opinion and order in two separate cases, which suggest that it is likely to re-evaluate *Saylor* in light of *Ring*.

In August of 2002, the supreme court first uttered the *Ring* word, and it did so *sua sponte*. Amy Bostick was convicted of three counts of murder arising out of the death of her children, ages one, two, and four, who were locked in their room during a house fire.⁵¹ After reciting the holding of *Apprendi*, which had been distinguished away in *Saylor*, the court acknowledged that *Ring* “made it clear that *Apprendi* applied to capital sentencing schemes.”⁵²

Contrary to *Apprendi* and *Ring*, the defendant’s sentences to life without parole pursuant to Ind. Code § 35-50-2-9, were based on facts extending the sentence beyond the maximum authorized by the jury’s verdict finding her guilty of murder. Because of the absence of a jury determination that qualifying aggravating circumstances were proven beyond a reasonable doubt, we must therefore vacate the trial court’s sentence of life without parole.⁵³

The court did not engage in harmless error analysis, despite the nature of the guilt phase verdicts, i.e., the murder of three children that were indisputably well under the age of twelve—the alleged aggravating circumstance.⁵⁴ Rather, the

47. *Id.* at 592 (quoting ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2001)).

48. *Id.* at 597.

49. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19) (internal citation removed).

50. *Id.*

51. *Bostick v. State*, 773 N.E.2d 266, 267 (Ind. 2002).

52. *Id.* at 273.

53. *Id.*

54. See IND. CODE § 35-50-2-9(b)(12). For reasons unclear in the court’s opinion, the State did not allege the b(8) aggravator of multiple killings, which would seemingly have obviated reversal on *Ring* grounds.

court noted that the State could elect not to pursue its request for a life without parole sentence, in which case the trial court could resentence the defendant to a term of years, or, if the State elected to proceed with its original request, the trial court would be required to convene a new penalty phase jury and conduct further proceedings pursuant to Indiana Code section 35-50-2-9.⁵⁵ Justice Dickson, writing for a four-justice majority on the issue, cited extensive precedent for the proposition of allowing a new jury to be convened in a variety of circumstances, including a penalty phase.⁵⁶ However, Justice Sullivan dissented on this issue, reasoning that there is “no statutory authority to convene a new penalty phase jury once the original jury has been unable to reach a recommendation.”⁵⁷ The language of the statute, which applies to a jury’s “recommendation” rather than a verdict, provides that in cases in which unanimity is not achieved, the trial court “shall discharge the jury and proceed as if the hearing had been to the court alone.”⁵⁸

Finally, two months after *Bostick*, the supreme court addressed the effect of *Ring* in an order denying a motion to file a successive petition for post-conviction relief. In *Wrinkles v. State*,⁵⁹ the court found it unnecessary to address whether *Ring* applies retroactively because “*Ring* is not implicated in petitioner’s case under any view that the Court might find plausible.”⁶⁰ The court relied on three specific grounds. First, Wrinkles was found eligible for the death sentence based on the commission of multiple murders; therefore, the jury’s guilt-phase verdict finding him guilty of three murders necessarily established the capital aggravator of having committed more than one murder.⁶¹ In addition, the penalty phase instruction—requiring the jury to find the existence of the charged aggravating circumstance beyond a reasonable doubt and that the aggravating circumstance outweighed the mitigating circumstances—proves that the jury “necessarily determined the fact of the multiple murders beyond a reasonable doubt.”⁶² Finally, the court noted that Wrinkles had made “some of the same arguments” on this subject in his direct appeal, and “to the extent the claims now presented are the same claims made and rejected in prior proceedings, the claims are *res judicata*.”⁶³

D. Issues Remain

In light of *Ring*, as explained in *Bostick*, it would seem very likely that the court will grant rehearing in *Saylor*, although the result may well remain the

55. *Bostick*, 773 N.E.2d at 274.

56. *Id.* at 274 n.5.

57. *Id.* at 275 (Sullivan, J., dissenting).

58. *Id.* at 274 (quoting IND. CODE § 35-50-2-9(f)).

59. 776 N.E.2d 905 (Ind. 2002).

60. *Id.* at 907.

61. *Id.*

62. *Id.* at 907-08.

63. *Id.* at 908.

same if the court addresses non-retroactivity. Neither rationale relied upon by the *Saylor* majority appears sound after *Ring*: (1) *Walton* is not controlling; indeed, it was overruled. *Apprendi* now reigns supreme—and requires that an aggravating circumstance that enhances the sentence to death be proved beyond a reasonable doubt to a jury. (2) The strained construction of the Indiana statute is at odds with the Supreme Court's reasoning in *Ring*, which found that under the statutory scheme in Arizona, the maximum sentence for murder was indeed elevated by the separate death penalty provision. Indeed, the Indiana Supreme Court's opinion in *Bostick* suggests that it realizes the non-viability of *Saylor*'s reasoning as a means to uphold a death sentence under the Indiana statute, as it found that the life sentences there were based on facts that "extend[ed] the sentence beyond the maximum authorized by the jury's verdict finding her guilty of murder."⁶⁴ In addition to the viability of *Saylor*, several significant questions will need to be sorted out in future opinions.

Broadly stated, the court will need to address how wide the effects of *Ring/Apprendi* will reach. Not surprisingly, the defense community and prosecutors have very different views, as the former suggest that every death penalty case is impacted while the Attorney General suggests at most only six cases are affected.⁶⁵ The defense position is a bit untenable in view of the inapplicability of *Apprendi/Ring* to cases in which the aggravating factor was the fact of a prior conviction. As Justice Boehm suggested in his concurring opinion in *Saylor*, this same reasoning arguably applies to death penalty aggravators such as probationary or parole status, which are proven by judicial records and do not require factfinding in the traditional sense by a jury.⁶⁶ Similarly, *Ring* would appear not to be implicated in cases in which the guilt phase verdict inherently proved the death penalty aggravator,⁶⁷ including the most commonly charged death penalty aggravator of the commission of multiple murders.⁶⁸

Each of these factors suggest that *Ring* will have a limited impact in Indiana, but an even broader consideration is retroactivity. For whatever reason, the *Saylor* majority did not address the issue of retroactivity but implicitly assumed that challenges under *Apprendi/Ring* could be raised in a collateral proceeding.⁶⁹ Similarly, although the supreme court refused to authorize the filing of a successive petition for post-conviction relief in *Wrinkles*, it nevertheless predicated its decision on the merits (or, better stated, the lack of merit) of the claims asserted rather than finding it procedurally barred under a theory on non-retroactivity.⁷⁰ It is possible that the court could continue to sidestep the issue by ruling on the merits of collateral *Ring* claims without explicitly holding that

64. *Bostick*, 773 N.E.2d at 273.

65. Denise G. Callahan, *State's Death Penalty Cases to be Debated Again*, IND. LAW., July 3, 2002, at 8.

66. *Saylor*, 765 N.E.2d at 568 (Boehm, J., concurring).

67. *See id.* at 575 (Sullivan, J., dissenting).

68. *See* IND. CODE § 35-50-2-9(b)(8) (Supp. 2002).

69. *See Saylor*, 765 N.E.2d at 535.

70. 776 N.E.2d at 907-08.

Ring applies retroactively, but to date the court has taken this approach only in cases in which the death row defendant is denied relief. The rehearing in *Saylor* will likely require the court to address the issue squarely, because it will be dispositive of whether or not Saylor's death sentence can stand. If *Ring* is held not to apply retroactively, then Saylor will lose as quickly as the court explains its non-retroactivity rationale. If, however, *Ring* does apply retroactively, then Saylor would appear to prevail under the reasoning in Justice Sullivan's dissent and in light of the implicit rejection of the majority's reasoning by *Ring*, as recognized by *Bostick*. If, however, Justice Boehm can convince at least two of his colleagues that Saylor's status as a probationer is similar to a prior conviction—the only explicit exception to the *Apprendi* doctrine—then Saylor may well lose regardless of retroactivity.

Although the court will likely decide the important issue of retroactivity soon, it is nearly impossible to predict how it will be resolved. Citing a number of federal circuit court of appeals' decisions, Justice Boehm opined in *Saylor* that *Ring* does not apply retroactively—at least under the federal standard of *Teague v. Lane*.⁷¹ However, Justice Sullivan, citing a number of district court opinions, expressed the opposite view while also noting that the issue of retroactivity was one to be decided under state law.⁷² The willingness of the other justices to address the *Apprendi/Ring* issue on its merits in *Saylor* (and all of the justices in *Wrinkles*) rather than taking the easy way out with retroactivity suggests that they may well decide not to bar claims on collateral review. Regardless of the resolution of retroactivity, however, it would seem that few cases will ultimately be impacted by *Ring*, even on collateral review, because most death penalty cases include at least one of the following: a unanimous recommendation for death, a guilty phase verdict of multiple murders, or imposition of the death penalty is based on the fact of a prior conviction.

Beyond the retroactivity and other concerns raised by *Saylor*, the Indiana Supreme Court and General Assembly will soon be called upon to resolve other apparent problems that persist with the death penalty statute, even as amended in 2002. The most significant problem is the lingering language of subsection (f), which allows the trial court to sentence a defendant to death if the jury is unable to reach a unanimous recommendation.⁷³ In the absence of a special verdict form, there is no basis to conclude that the jury has unanimously found that the aggravator was proved beyond a reasonable doubt, which therefore would violate *Ring*.⁷⁴ This defect could be easily corrected by striking the language of subsection (f) and making it clear that a death sentence can only be imposed when the jury unanimously finds the existence of an aggravating circumstance beyond a reasonable doubt.⁷⁵

71. *Id.* at 568 (Boehm, J., concurring in result).

72. *Id.* at 569.

73. See IND. CODE 35-50-2-9(f) (Supp. 2002).

74. Except in those cases in which the guilt phase verdict makes it clear, as noted above.

75. Subsection (d), however, is not problematic because *Ring* would not apply if a defendant waives the right to a jury trial by pleading guilty or being tried to the bench.

The applicability of *Ring* to the jury's finding of aggravating circumstances under the Indiana statute is straightforward; the thornier issue is the effect of *Ring* on mitigating circumstances, or more specifically the weighing of aggravators and mitigators. Subsection (k) specifically requires not only that the jury find the existence of an aggravating circumstance but also requires the jury to find that the aggravators outweigh the mitigators.⁷⁶ One could argue that this required weighing is "a fact" under *Apprendi/Ring*, which would therefore require that the jury unanimously find its existence beyond a reasonable doubt. This would create a substantial wrinkle in the conventional thinking, including that espoused by Justice Sullivan in his dissenting opinion in *Saylor*, which suggests that a special verdict form finding the existence of an aggravating circumstance would be sufficient to satisfy *Ring*.⁷⁷ Again, however, a requirement of a unanimous "recommendation" of death, after instructing the jury of both requirements of subsection (k), would clearly satisfy *Ring*. On the other hand, a guilt phase verdict of multiple murders or the fact of a prior conviction (or probationary status under the Boehm approach) would not necessarily satisfy *Ring* because the weighing with the mitigators would not have been considered.

In addition, despite the 2002 amendment that presaged *Ring*, the legislature did not alter the language throughout section nine that refers to the decision made by the jury as merely a "recommendation."⁷⁸ Language added to subsection (e) makes it clear that the trial court "shall" sentence the defendant according to the jury's recommendation in those cases in which a unanimous recommendation is reached. However, other language in the statute could be clarified—and, more importantly, instructions to the jury could be modified—to make it clear that the jury's decision is much more than a "recommendation," which would in turn eliminate the risk that the jury will approach its task with a diminished sense of responsibility that could undermine the reliability of its penalty phase verdict—not recommendation.

Finally, what should a trial judge do in the face of a hung jury? Subsection (f) tells the judge to "discharge the jury and proceed as if the hearing had been to the court alone,"⁷⁹ but this raises grave *Ring* concerns as discussed above. Although Justice Sullivan's dissent in *Bostick* suggests that the judge must order a term of years sentence based on this provision,⁸⁰ the remaining members of the supreme court seem to authorize, if not encourage, trial judges to order a new penalty phase if the State elects to persist in its request for a death or life without

76. *Id.* § 35-50-2-9(k) (Supp. 2002).

77. 765 N.E.2d at 574. Further, he specifically states that cases in which the jury found that the mitigating circumstances were not outweighed by the aggravating circumstances "would not violate *Apprendi*," presumably because only proof of the aggravating circumstance is required. *Id.* at 574-75.

78. IND. CODE § 35-50-2-9.

79. *See* IND. CODE § 35-50-2-9(f).

80. *See supra* notes 57-58 and corresponding text.

parole sentence.⁸¹ Although not necessary in light of the majority opinion in *Bostick*, the General Assembly could alleviate any confusion by amending subsection (f) if it believes that retrials are appropriate under the statute.

In sum, issues surrounding the death penalty in Indiana will likely remain, as they should, on the front burner of both the Indiana Supreme Court and the General Assembly as each sorts through the nuanced effects of *Ring*. The General Assembly would appear to be best positioned to resolve many of the issues by some fairly modest amendments to the statute, although the supreme court will surely need to become involved at some point in deciding issues such as retroactivity and harmless error.⁸²

II. OTHER DEVELOPMENTS

The death penalty drew a lot of attention on both the judicial and legislative front, but the appellate courts and legislature tackled a wide variety of other issues as well. A “survey” of the hundreds of cases addressing issues of criminal law and procedure necessarily requires a severe winnowing. Below is a summary of cases that resolved (or brought clarification to) a significant issue or created confusion that will need to be resolved.

A. Legislative Action

The talk of the 2002 session in Indiana, as in much of the country, was the state’s fiscal woes. Nevertheless, despite their likely fiscal impact, several bills were passed to create new offenses, add new enhancements, and alter procedural aspects of criminal law.⁸³ In the wake of the September 11, 2001, terrorist attacks, House Speaker Gregg offered a comprehensive bill criminalizing all sorts of activities relating to explosives and destructive devices as the first bill of the session. House Enrolled Act 1001 criminalized the possession, manufacture, transport, and distribution of a “destructive device.”⁸⁴ A rather broad list of items is included within the definition, but the statute also contains exclusions for such things as guns and devices not designed to be used as weapons.⁸⁵ Existing statutes were amended to provide for enhanced penalties when a person disrupts a food processing facility,⁸⁶ misappropriates another person’s identifying information,⁸⁷ disrupts airport security,⁸⁸ or launders money with a terrorist

81. See *supra* notes 55-56 and corresponding text.

82. In *Ring*, the Court declined to address the State’s harmless error argument, citing *Neder v. United States*, 527 U.S.1, 25 (1999), for the proposition that it “ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance.”

83. The significant amendments to the death penalty and child solicitation statutes are discussed elsewhere. See Part I, *supra*, and II.B, *infra*.

84. See IND. CODE § 35-47.5-5-2 (Supp. 2002).

85. See *id.* § 35-47.5-2-3.

86. See *id.* § 35-43-1-2.

87. See *id.* § 35-43-5-3.6.

88. See *id.* § 35-45-1-3 (disorderly conduct).

motive.⁸⁹ The Senate also got in on the action, approving a bill criminalizing the entry into a secured area of an airport,⁹⁰ using force or threat of violence to disrupt or hijack an aircraft in flight,⁹¹ as well as enhancing the offense of criminal confinement when committed on an aircraft.⁹² The self-defense statute was also amended to allow the use of reasonable, including deadly, force to stop another person from hijacking an aircraft in flight.⁹³

Outside of the terrorism realm, the new offenses of “fondling in the presence of a child”⁹⁴ and “malicious mischief”⁹⁵ were criminalized, while other statutes were amended to provide for more severe penalties for child exploitation through use of a computer,⁹⁶ leaving the scene of a boating accident,⁹⁷ cruelty to animals,⁹⁸ and criminal mischief to a railroad crossing.⁹⁹ Although it is not surprising that legislators would seek to criminalize the possession of anything that smacks of child pornography, the expansion of the definition of child pornography to include “digitized images”¹⁰⁰ will likely be the first, if not the only, of the amendments to go down in constitutional flames.

Before the 2002 session began, the United States Supreme Court heard oral argument in *Ashcroft v. Free Speech Coalition*,¹⁰¹ a challenge to the federal Child Pornography Prevention Act of 1996 (CPPA), which extended the federal prohibition against pornography to include “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is, or appears to be, of a minor engaging in sexually explicit conduct.”¹⁰² The prohibition did not “depend at all on how the image is produced” and thus extended to “computer-generated images, sometimes called ‘virtual child pornography.’”¹⁰³ After an exhaustive review of precedent and detailed rejection of the Government’s contentions, the Court held that section 8(B) of CPPA “abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.”¹⁰⁴ If an eager Indiana prosecutor decides to bring a child pornography charge based on “digitized images” under the Indiana statute, one would expect the same result.

89. *See id.* § 35-45-15-5.

90. *See id.* § 35-47-6-1.4.

91. *See id.* § 35-47-6-1.6.

92. *See id.* § 35-42-3-3.

93. *See id.* § 35-41-3-2.

94. *See id.* § 35-42-4-5.

95. *See id.* § 35-45-16.

96. *See id.* § 35-42-4-4.

97. *See id.* § 14-15-4-4.

98. *See id.* § 46-3-12.

99. *See id.* § 35-43-1-2.

100. *See id.* § 35-42-4-4.

101. 535 U.S. 234 (2002).

102. *Id.* at 241 (quoting 18 U.S.C. § 2256(8)(B) & (D)).

103. *Id.*

104. *Id.* at 256.

Finally, the death penalty statute was amended to specifically allow a victim representative to make a statement in the presence of the defendant “regarding the impact of the crime on family and friends.”¹⁰⁵ Although such statements have long been common at sentencing hearings in general and death penalty ones in particular, the amendment is significant because it specifically provides that the victim impact statement is to be given *after* the court pronounces sentence.¹⁰⁶ Although victims are unlikely to feel that their voice was truly heard—or that it made any difference because of its untimeliness—the amendment appears certain to eliminate any possibility of future claims that a trial court improperly considered victim impact evidence.¹⁰⁷

B. Online Child Solicitation

Since 1996, Indiana has criminalized the solicitation of a child over a computer network.¹⁰⁸ However, a solicitation over a computer network is punished as a Class C felony whereas a face-to-face solicitation is merely a D felony.¹⁰⁹ Surprisingly, the thorny issues surrounding an online child solicitation did not surface in an Indiana appellate court opinion for a half decade after the amendment. During the survey period, two appellate opinions and some significant legislative action clarified the law regarding online child solicitations.

In *Kemp v. State*,¹¹⁰ a man drove over 150 miles from Madison County to Clark County to meet “Brittney4u2,” a detective who was posing as a fourteen-year-old girl, for sex after conversing in an Internet chat room. Kemp was charged with child solicitation and attempted child molesting, but the trial court dismissed all counts on the basis that there was no actual child victim as required for each offense.¹¹¹ The State appealed, and the court of appeals affirmed.

As regards the online solicitation, the court relied on the test set forth in *Ward v. State*¹¹² in finding that the conduct alleged in the charging information did not “rise to the level of child solicitation.”¹¹³ The *Ward* test requires, among other things, that the solicitation take the form of urging and urge the “immediate commission” of the crime.¹¹⁴ The alleged solicitation failed for both of these reasons. Although Kemp engaged in a sexually explicit dialogue with the detective, he did not urge him to engage in any conduct, and Kemp’s planned sexual activity would not have been “immediately committed” as required by

105. See IND. CODE § 35-50-2-9(e) (Supp. 2002).

106. See *id.*

107. See, e.g., *Bivins v. State*, 642 N.E.2d 928, 956-57 (Ind. 1994).

108. See IND. CODE § 35-42-4-6 (Supp. 1996).

109. *Id.*

110. 753 N.E.2d 47 (Ind. Ct. App. 2001).

111. *Id.* at 49.

112. 528 N.E.2d 52, 54 (Ind. 1988).

113. *Id.* at 52.

114. *Id.* at 51 (citing *Ward*, 528 N.E.2d at 54).

Ward.¹¹⁵

The court could have ended the opinion at this point, and it would have generated little attention or controversy because police could alter their conduct in the future to be sure that the suspect—and not the detective—did the urging and an immediate meeting was arranged. But the court continued with a paragraph of dicta that garnered considerable public attention and drew a swift legislative response:

We recognize the many challenges the Internet poses in preventing the commission of criminal acts against children, along with the difficulty in monitoring the cyber world. Indiana legislators may wish to consider a somewhat more expansive definition of child solicitation in circumstances where a computer network is involved. In the current version of the statute, a defendant's act of solicitation must be directed only toward a "child." Our General Assembly could revise the statute to contain language similar to the Florida version, which permits a defendant to be found guilty of committing the offense if a child or another person "believed by the defendant to be a child" is solicited. Amendment to the statute might very well permit the State to prosecute offenders for Child Solicitation in situations such as the one presented in the instant case.¹¹⁶

Within a few months the General Assembly amended the child solicitation statute in a several significant ways, presumably in response to *Kemp* and in anticipation of another case that was in the appellate pipeline. First, a broad definition of the term "solicit" was added to the statute; it means "to command, authorize, urge, incite, request, or advise" a person to engage in prescribed sexual activity through any medium.¹¹⁷ Second, the statute was amended to criminalize not only the solicitation of a child under fourteen, but also the solicitation of "an individual the person believes to be a child under fourteen (14) years of age."¹¹⁸ Additional language was also added to mention the possibility of prosecuting "attempted solicitation," and, perhaps most significantly, the General Assembly appears to have legislatively abolished part of the *Ward* test: "the State is not required to prove that the person solicited the child to engage in an act described in subsection (b) at some immediate time."¹¹⁹

Several weeks after the statute was amended, the court of appeals issued its opinion in *Laughner v. State*,¹²⁰ which suggested that at least some of the legislative action was not necessary. Laughner, who was in Indianapolis,

115. *Id.* at 52.

116. *Id.* (internal citation and footnote omitted).

117. IND. CODE § 35-42-4-6(a) (Supp. 2002).

118. *Id.* § 35-42-4-6(b).

119. *Id.* § 35-42-4-6(c).

120. 769 N.E.2d 1147 (Ind. Ct. App. 2002). The author served as co-counsel for Mr. Laughner on appeal. Every effort has been made to present an objective summary of the case and its future implications in this Article.

engaged in an online sexual dialogue with a detective in Evansville who was pretending to be a thirteen-year-old boy. One afternoon Laughner asked “u wanna get off?,” and the two arranged to meet in Evansville, where Laughner was arrested.¹²¹ He was charged with and convicted of the offense of attempted child solicitation; he raised several issues of first impression on appeal.

The court began by finding that the crime of attempted child solicitation does indeed exist in Indiana.¹²² Although double inchoate liability has been greeted with disfavor in some states¹²³ and criminal law treatises,¹²⁴ the court of appeals looked to the Indiana statutes, noting that the child solicitation statute is “a specific one,” while the attempt statute is one of general applicability.¹²⁵ “No statutory language forbids there being an attempt offense in the case of the crime of solicitation.”¹²⁶

Next, the court found it of no consequence that an actual child was not involved because the offense was charged as an attempted—not actual—solicitation.¹²⁷ The court reasoned that the Indiana Supreme Court had found it “clear” that language in Indiana’s attempt statute¹²⁸ had “reject[ed] the defense of impossibility” in *Zickefoose v. State* over two decades earlier.¹²⁹ *Zickefoose* did not discuss whether there is a distinction between factual and legal impossibility, and the court of appeals’ opinion suggests there is not.¹³⁰ *Kemp* implicitly recognizes legal impossibility as a defense, and other court of appeals’ authority suggests the issue has not been resolved.¹³¹ *Laughner*—and the 2002 amendment—appear to have laid this issue to rest in the realm of child solicitations, however.

As to other issues, the court found that the more severe penalty for online—as opposed to face-to-face—solicitations “somewhat troubling” but not a violation of the Proportionality Clause of the Indiana Constitution.¹³² The legislature may have found that the dangers of the Internet require greater

121. *Id.* at 1152.

122. *Id.* at 1153-55.

123. *See, e.g.,* *Brown v. State*, 550 So.2d 142, 144 (Fla. Dist. Ct. App. 1989) (“When a statutory offense [solicitation] is itself an attempt to complete an act, there is no separate crime of an attempt to commit the offense.”); *SEO v. Austintown Township*, 722 N.E.2d 1090, 1093 (Ohio Ct. App. 1998).

124. *See, e.g.,* CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 693 at 584 (15th ed. 1996) (“There can be no attempt to commit a crime which is itself an attempt . . .”).

125. *Laughner*, 769 N.E.2d at 1154.

126. *Id.*

127. *Id.* at 1155.

128. *See* IND. CODE 35-41-5-1(b).

129. *Laughner*, 769 N.E.2d at 1155 (quoting *Zickefoose v. State*, 388 N.E.2d 507, 510 (Ind. 1979).

130. *See id.*

131. *See King v. State*, 469 N.E.2d 1201, 1205 (Ind. Ct. App. 1984) (Conover, J., dissenting).

132. *Laughner*, 769 N.E.2d at 1156.

vigilance or that Internet use lessens inhibitions.¹³³ Finally, the court found venue proper in Vanderburgh County (Evansville) because Laughner had taken “action directed at” that county, even though the solicitation occurred online from his computer in Marion County.¹³⁴

Although *Kemp* signaled difficulties in future prosecutions of Internet child solicitations, the 2002 amendment resolved most—if not all—of these. In addition, the court of appeals’ rejection of several novel claims in *Laughner* leaves limited room for future attacks on such prosecutions. As suggested by both *Kemp* and *Laughner*, most Internet solicitations do not allow for the “immediate commission” of sexual conduct, as the perpetrator is often counties—if not states—away. The stringent *Ward* test seemingly would have presented an obstacle to such prosecutions, but the 2002 amendment appears to have closed that loophole. Although the amendment’s implicit overruling of *Ward* may be challenged in the future, *Ward* appears not to have been grounded in any constitutional provision such that a challenge would be fruitful.

C. Confessions

Is the murder confession of a mentally retarded individual with an IQ of 67 rendered involuntary when the police misstate or exaggerate information such as producing a fabricated fingerprint card and a police report that erroneously stated that the victim died of natural causes? Not in Indiana under well-settled precedent.¹³⁵ However, in *Miller v. State*¹³⁶ the supreme court broke new ground, not in holding that the confession was admissible, but in reversing the conviction because the trial court refused to allow a defense psychologist to testify about police interrogation techniques and false confessions.

Despite the trial court’s ruling that the statement was voluntary and admissible, the supreme court reiterated that the defendant could still “challenge its weight and credibility” before the jury.¹³⁷ The trial court’s ruling is a “preliminary factual determination,” but the jury “remains the final arbiter of all factual issues under Article I, Section 19 of the Indiana Constitution.”¹³⁸ If the jury finds that a statement was involuntarily given, it should disregard it in determining the defendant’s guilt or innocence.¹³⁹

In reversing the trial court’s exclusion of the expert testimony, the supreme court found it unimportant that “the content of the interrogation was not in dispute” in light of the defense trial strategy to challenge the voluntariness of his

133. *Id.*

134. *Id.* at 1157.

135. See generally *Henry v. State*, 738 N.E.2d 663, 665 (Ind. 2000) (finding no error in the admission of a confession in which the officers falsely told the defendant that his fingerprints were found at the crime scene and that a witness had identified him as the person who killed the victim).

136. 770 N.E.2d 763 (Ind. 2002).

137. *Id.* at 772.

138. *Id.*

139. *Id.* at 773.

statement to police.¹⁴⁰ Because the proffered testimony would have assisted the jury in understanding the psychological aspects of police interrogation and the interrogation of mentally retarded suspects—topics outside its common knowledge and experience—the testimony’s complete exclusion deprived the defendant of the opportunity to present a defense.¹⁴¹ Finally, the court concluded that the error was not harmless because of the prominence of the defendant’s statement in the State’s case, especially the prosecutor’s great emphasis on it which included replaying a portion during closing argument.¹⁴²

The significance of *Miller* remains to be seen. Perhaps it is an anomaly based on the unique set of facts of police deception of a mentally retarded suspect. However, language in the opinion suggests broader applicability as the court reasoned that “relevant aspects of police interrogation” was a proper subject for expert testimony because it is a topic outside of the jury’s knowledge.¹⁴³ Allowing the defendant to present expert testimony is not particularly controversial, but thornier issues arise when defendants who plan to challenge the voluntariness of their confessions desire the appointment of an expert at public expense. Although the appointment of experts in cases in which a defendant asserts insanity is mandated by statute,¹⁴⁴ a variety of other defenses and trial strategies may now warrant expert testimony and the attendant monetary and time costs. The circumstances under which such testimony will be allowed and under which an expert may be hired at public expense will need to be fleshed out in future cases.

D. Double Enhancements

Two years ago, the supreme court placed an important restriction on the use of double enhancements for the crime of carrying a handgun without a license. In *Ross v. State*,¹⁴⁵ the court held that a misdemeanor handgun conviction cannot be both elevated to a felony and then used as a felony for purposes of the general habitual offender statute.¹⁴⁶ That opinion was decided based on principles of statutory construction and the rule of lenity.¹⁴⁷

Not surprisingly, other defendants have since tried to use *Ross* to limit the applications of enhancements in other contexts. In *State v. Downey*,¹⁴⁸ the supreme court granted transfer to address the propriety of enhancing an A misdemeanor marijuana possession charge to a D felony and then using the

140. *Id.*

141. *Id.* at 774.

142. *Id.*

143. *Id.* at 774.

144. See IND. CODE § 35-36-2-2 (1998).

145. 729 N.E.2d 113 (Ind. 2000).

146. *Id.* at 117. See generally Joel M. Schumm, *Recent Development in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 662 (2001).

147. *Ross*, 729 N.E.2d at 113.

148. 770 N.E.2d 794 (Ind. 2002).

felony offense as part of the basis of the general habitual substance offender enhancement. Relying heavily on *Ross*, the court of appeals found the double enhancement improper.¹⁴⁹ After providing a detailed and thoughtful explanation of the different types of habitual offender enhancements and precedent applying them, the supreme court reversed and found the enhancement proper.¹⁵⁰

Although *Downey* involved the same general principle at issue in *Ross*, the court reached a different result based on the presence of clear statutory language that was not present in *Ross*. First, the court noted the general rule that “absent explicit legislative direction, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute.”¹⁵¹ Although that general rule applies to both general and specialized habitual offender enhancements, unlike with the general habitual offender statute in *Ross*, there is explicit legislative direction in the habitual substance offender statute, which applies to “substance offenses,” including “a Class A misdemeanor or felony in which the possession . . . of . . . drugs is a material element of the crime.”¹⁵² This was the hook on which the court hung its holding: “By its specific inclusion of drug possession misdemeanors and felonies in the category of offenses that are subject to habitual substance offender enhancement, we find the Legislature intended to authorize such an enhancement notwithstanding the existence of the drug possession progressive penalty statute.”¹⁵³

Downey is significant for at least two reasons. First, its analysis and synthesis of prior precedent offers clear direction to courts confronted with similar challenges to “double enhancements” in the future. Second, the case provides legislators and those who draft statutes for them of an example of how to draft a statute to allow double enhancements in the future. In light of the increasing number of progressive penalty statutes, one can hope greater specificity, as in the statute at issue in *Downey*, will obviate—or at least reduce—the need for judicial interpretive intervention in the future. As previously noted, “double enhancement” decisions have been based on the application of principles of statutory construction and not alleged violations of constitutional provisions such as disproportionate sentences;¹⁵⁴ therefore, future legislative efforts at permitting double enhancements, if that is desired, can be easily achieved.¹⁵⁵

149. *Id.* at 795.

150. *Id.* at 795-98.

151. *Id.* at 798.

152. *Id.*

153. *Id.*

154. See Schumm, *supra* note 146, at 663.

155. As noted in a footnote in *Downey*, however, the General Assembly responded to *Ross* not by amending the statute to allow double enhancements for handgun offenses but rather making it clear that they were not permitted. *Downey*, 770 N.E.2d at 797 n.5. See also Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 35 IND. L. REV. 1347, 1349-50 (2002) (discussing the 2001 statutory amendment).

E. Jury Instruction Simplicity

At least some members of the Indiana Supreme Court appear to have developed a heightened resolve to simplify jury instructions by eliminating those that emphasize certain pieces of evidence or parts of the trial. As discussed in last year's survey, a majority of the court banned future use of the flight instruction in *Dill v. State*¹⁵⁶ in 2001.¹⁵⁷ The court reasoned that the instruction was confusing, unnecessarily emphasized certain evidence, and had the potential to mislead the jury.¹⁵⁸ Potentially on the chopping block this year is the frequently used but often maligned instruction that tells jurors they may convict upon "the uncorroborated testimony of the victim." The instruction is often tendered by the State in trials involving sex crimes against children in which the child victim may offer the only direct evidence against the accused.

Although one or two justices often vote to grant transfer in cases that fail to garner the required three votes, rarely do they feel so strongly about their vote to draft and publish a formal explanation of their view. In *Carie v. State*,¹⁵⁹ however, Justice Dickson provided a thorough explanation of his disagreement with the instruction in a dissent from the denial of transfer. He opined that the supreme court should grant transfer to express its disapproval of the future use of such instructions because they improperly refer to the State's witness as "the victim," improperly emphasize a single piece of evidence and may suggest that the jury ignore other evidence, use the legal term "uncorroborated" that may be confusing or misleading to the jury, and import a standard of appellate review that is inappropriate for jury consideration.¹⁶⁰ He concluded that, although the court had "allowed similar instructions to survive appellate review" in the past, he believed that "the Court today" would find such instructions improper.¹⁶¹

Relying on *Carie* and cases holding that instructions that direct the jury to give special scrutiny and attention to the testimony of a particular witness should not be given, the court of appeals in *Scott v. State*¹⁶² suggested that the instruction was "improper" despite other cases upholding similar instructions.¹⁶³ Although the court noted that Justice Dickson's dissent from the denial of transfer "seems to be a warning of an impending change" in the propriety of such instructions, it concluded that "even if this instruction is later found to be improper, its use in this case was harmless" based on the testimony presented at trial.¹⁶⁴

Barring the future use of this instruction is significant in its own right, but

156. 741 N.E.2d 1230 (Ind. 2001).

157. See Schumm, *supra* note 155, at 1361-62.

158. *Dill*, 741 N.E.2d at 1232.

159. 761 N.E.2d 385 (Ind. 2002).

160. *Id.* at 385-86.

161. *Id.* at 386-87.

162. 771 N.E.2d 718 (Ind. Ct. App. 2002).

163. *Id.* at 728.

164. *Id.* at 729.

Justice Dickson's opinion and *Carie* is also significant because of the trend that it both recognizes and espouses. Instructions that emphasize a "particular evidentiary fact, witness, or phase of the case"¹⁶⁵ have largely disappeared, and there is powerful ammunition to attack any remaining vestiges.

F. Non-constitutional Double Jeopardy

Any discussion of significant developments in the realm of criminal law would not be complete without a discussion of the morass that Indiana Double Jeopardy law became during this Survey period. Granted, double jeopardy is generally viewed as a constitutional issue, and the supreme court's seemingly landmark opinion in *Richardson v. State*¹⁶⁶ in 1999 made clear, or at least it appeared to make clear at the time, that the protection against multiple punishments in Indiana was grounded in article I, section 14 of the Indiana Constitution and greater than that afforded by the Federal Constitution. However, the few short years of the repeated application of a well-intentioned but less than ideally phrased constitutional test of *Richardson* make clear that a square peg will never fit in a round hole—and now the source of Double Jeopardy protection in Indiana is anyone's guess.

As noted in this issue's survey article on state constitutional law, there have been significant developments regarding the Double Jeopardy Clause of the Indiana Constitution.¹⁶⁷ Rather than recounting those here, this section will briefly explain the problems surrounding the actual evidence test of *Richardson*, why the Indiana Constitution may no longer protect against multiple punishments, and the implications of the confusion in double jeopardy law for the future.

The *Richardson* "actual evidence test"¹⁶⁸ was widely applied in its infancy to reduce convictions in many cases under a variety of different circumstances.¹⁶⁹ The supreme court appeared willing to bend the language of the actual evidence test to apply it to situations such as cases in which one conviction was enhanced based on an element for which the defendant was separately punished by another conviction by phrasing the test as whether the same evidence used to establish the essential elements of one offense "was included among the evidence" establishing the essential elements of the second offense.¹⁷⁰ This formulation was seemingly consistent with the views expressed in the concurring opinions of

165. *Carie*, 761 N.E.2d at 385 (Dickson, J., dissenting from the denial of transfer).

166. 717 N.E.2d 32 (Ind. 1999).

167. See Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961, 974-79 (2003).

168. See *Richardson*, 717 N.E.2d at 53. *Richardson* also recognized a "statutory elements" test, which essentially mirrors the federal constitutional test of *Blockburger v. United States*, 284 U.S. 299 (1932) and is therefore not useful to criminal defendants in Indiana.

169. See Schumm, *supra* note 146, at 663 n.151.

170. See, e.g., *Spears v. State*, 735 N.E.2d 1161, 1165 (Ind. 2000); *Lowrimore v. State*, 728 N.E.2d 860, 869 (Ind. 2000); *Wise v. State*, 719 N.E.2d 1192, 1201 (Ind. 1999).

Justices Sullivan and Boehm in *Richardson*, offered more protection than that afforded under the Federal Constitution, and seemingly generated little controversy or confusion within or outside the appellate courts.

Without much explanation, however, the court retreated from this approach in 2001 in *Redman v. State*,¹⁷¹ where the court unanimously held:

it is not sufficient merely to prove that the same evidence may have been used to prove a *single element* of two offenses. Rather, it is necessary to show a possibility that the same evidentiary facts were used to prove the *body of essential elements* that comprise each of two or more of the offenses resulting in convictions.¹⁷²

This clarified formulation raised significant questions about the enhancement cases in which the double jeopardy concern arises not from the “body of essential elements” of two offenses but from the body of elements of one offense and the enhancing element of the other offense.

The gap of protection created by *Redman* appeared to be at least partially filled by *Pierce v. State*,¹⁷³ in which the supreme court sua sponte addressed a defendant’s constitutional double jeopardy claim under “a series of rules of statutory construction and common law that are separate and in addition to the protections afforded by the Indiana Double Jeopardy Clause.” *Pierce* was the first of what has become a growing line of cases in which the supreme court sua sponte addressed a defendant’s constitutional double jeopardy claim under the rules of statutory construction and common law espoused in the concurring opinions of Justices Sullivan and Boehm in *Richardson*.¹⁷⁴

Six months after *Pierce*, however, in *Guyton v. State*¹⁷⁵ the supreme court cast grave doubt on the continued vitality of *Richardson* when it addressed a claimed double jeopardy violation by quoting the actual evidence test of *Richardson* but then addressing the claim solely under the categories espoused in Justice Sullivan’s concurring opinion in *Richardson*.¹⁷⁶ *Guyton* is significant not because of what it says, but rather for what it leaves unsaid, which is best highlighted by its concurring opinions. Expressing his view of the continued vitality of *Richardson*, Justice Dickson noted that the majority did not address the constitutional claim but instead discussed only the “related” claim that is “separate from and additional to the constitutional claim.”¹⁷⁷ In contrast, Justice Boehm noted “widespread confusion reflected in the Court of Appeals cases attempting to apply *Richardson*” and opined that the court “owe[s] an explanation of this mystery [surrounding double jeopardy] because I believe we

171. 743 N.E.2d 263 (Ind. 2001).

172. *Redman v. State*, 743 N.E.2d 263, 267 (Ind. 2001) (emphasis in original).

173. 761 N.E.2d 826, 829 (Ind. 2001).

174. See, e.g., *McAbee v. State*, 770 N.E.2d 802, 806 (Ind. 2002); *Henderson v. State*, 769 N.E.2d 172, 178 (Ind. 2002).

175. 771 N.E.2d 1141 (Ind. 2002).

176. *Id.* at 112-43.

177. *Id.* at 1145 (Dickson, J., concurring in result).

have in effect abandoned *Richardson*, and should be explicit in doing this so future trial and appellate courts can follow a consistent methodology in reviewing double jeopardy claims.”¹⁷⁸

As Justice Boehm’s concurring opinion pointedly suggests, the variety of approaches employed by the supreme court to double jeopardy claims raises serious questions that will need to be resolved. At the most basic level, the source of protection against multiple convictions in Indiana is no longer clear; it could be (as in *Richardson*) the Indiana Constitution, rules of common law and statutory construction, or both. This fundamental concern gives rise to other practical concerns. Should a defendant raise the claim under *Richardson* or *Guyton* or both? If a defendant cites only *Richardson* and the Indiana Constitution, must (or may) the appellate court review the claim under the other rules? Is it possible that different results could be reached under each?

Early indications suggest that the supreme court will continue to apply *Guyton*, which appears to offer fairly broad protection to criminal defendants, perhaps as a fallback after finding no *Richardson* violation.¹⁷⁹ If the supreme court does not revisit the issue, however, inconsistencies and confusion surrounding Indiana double jeopardy law may arise in the court of appeals or among the justices of the supreme court.

The panacea suggested by Justice Boehm’s concurring opinion in *Guyton* would be an opinion that adopts a consistent methodology for future cases, while clarifying or disapproving prior cases inconsistent with that methodology. Until that happens, however, one would expect defendants to raise their claims under both the constitutional test of *Richardson* and the non-constitutional bases most recently applied in *Guyton*, which will in turn impose an additional burden on the State to respond to both and on the appellate courts to address both.

III. APPELLATE SENTENCE REVIEW

As it has for the past two years, this Survey ends with a review of the developments surrounding substantive appellate sentence review in Indiana. The important purpose behind the constitutional amendment that allowed substantive sentence review in Indiana was to make the process more akin to that in England, where sentence review is “the main business” of the Court of Appeal (Criminal Division), which has developed sentencing principles designed to bring consistency to the inherently murky waters of sentencing.¹⁸⁰ Such consistency can be achieved only through the adoption and consistent application of sentencing principles as well as a greater reliance on the specifics of previous cases as precedent in addressing substantive sentencing claims. Although cases in which sentences have been reduced provide useful comparisons for litigants to argue and judges to consider in future cases, cases in which sentences have

178. *Id.* at 1149 (Boehm, J., concurring in result).

179. *See, e.g., Carrico v. State*, 775 N.E.2d 312, 313-14 (Ind. 2002); *Robinson v. State*, 775 N.E.2d 316, 319-20 (Ind. 2002).

180. *See Schumm, supra* note 146, at 671.

survived challenges on appeal are equally important, not only for their comparative value, but also because of the principles applied in reaching that decision.

Since the 1970 constitutional amendment, Sections 4 and 6 of Article VII of the Indiana Constitution have granted the authority to revise sentences to both the Indiana Supreme Court and Court of Appeals. Appellate Rule 7(B) provides the specific standard and criteria employed for such revisions: "The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender."¹⁸¹

A. Indiana Supreme Court Cases

Although the court of appeals has become the primary arbiter of sentence review by virtue of its jurisdiction in all term-of-years appeals,¹⁸² the supreme court remains crucial to the issue because of its transfer jurisdiction and, ideally, the guidance offered to the court of appeals and trial courts by its opinions. As discussed below, the justices on the supreme court have taken divergent approaches in addressing sentencing claims, which cast some doubt on the possibility of something that looks like consistency on a different issue ridden with unique offenses and offenders. The justices' consideration of and emphasis on the trial court's role, the relevant sentencing considerations, and the amount of detail and importance of prior sentencing cases as precedent are important, but the consistent application of principles, such as the one that purports to limit maximum sentences "to the very worst offenses and offenders,"¹⁸³ is arguably the most effective and easiest way in which to level the field of sentence disparity.

The approach taken by Justice Sullivan appears to meld the procedural review of aggravating and mitigating circumstances with the substantive appellate review standard. For example, in *McAbee v. State*,¹⁸⁴ Justice Sullivan, writing for the court, cited neither Article VII, Section 4 nor Appellate Rule 7(B) in addressing a claim that a sentence was manifestly unreasonable.¹⁸⁵ Rather, the opinion recounted the statutory provisions regarding the presumptive sentence and range of sentences as well as case law governing the propriety of consecutive sentences.¹⁸⁶ The court then recounted the aggravating and mitigating circumstances found by the trial court and held that it had "properly weighed the aggravating and mitigating circumstances and found that the aggravators far outweighed the mitigating circumstances. In light of the circumstances of the case, we do not find that the sentence is manifestly unreasonable."¹⁸⁷ In *Fredrick*

181. IND. APP. R. 7(B) (2002).

182. See Schumm, *supra* note 146, at 669.

183. See, e.g., *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998).

184. 770 N.E.2d 802 (Ind. 2002).

185. *Id.* at 806-07.

186. *Id.* at 806.

187. *Id.* at 807.

v. State,¹⁸⁸ Justice Sullivan took a similar approach, addressing a claim of manifest unreasonableness by finding that the challenged aggravating circumstances were not improper and affirming the sentence.¹⁸⁹ However, in *Lander v. State*,¹⁹⁰ Justice Sullivan, writing for a unanimous court, reduced an aggregate sentence of eighty-five years for murder and conspiracy to commit robbery to sixty-five years—the maximum for murder.¹⁹¹ Relying on the factors found by the trial court, he reasoned that “the nature of the Defendant’s crime” did not warrant consecutive sentences: “Defendant was part of a botched robbery, after which he shot the victim in the arm. Defendant was also twenty years old and had never had a prior felony record.”¹⁹² Although these considerations bear a heavy resemblance to the “nature of the offense” and “character of the offender,” the *Lander* opinion does not use the parlance of Appellate Rule 7(B) but rather speaks in terms of “aggravating” and “mitigating” circumstances—the language of the sentencing statute that is applied by trial courts.¹⁹³

Justice Rucker has taken a similar Appellate Rule 7(B)-free approach at times. For example, in *Powell v. State*,¹⁹⁴ Justice Rucker, writing for the court, upheld the maximum sentence of sixty-five years imposed on an on-duty police officer who “entered a house on the pretext of serving a search warrant. While present he participated in killing the resident and seriously injuring two innocent bystanders. And he did so for the sake of stealing drugs and money.”¹⁹⁵ In a single paragraph, which made no mention of the factors bearing on the “character of the offender,” such as a prior criminal history, the court upheld the sentence because it was “not persuaded that a sixty-five years sentence for Powell’s crime is manifestly unreasonable.”¹⁹⁶ However, in *Lacey v. State*,¹⁹⁷ Justice Rucker did address the separate considerations of the nature of the offense and character of the offender in upholding an enhanced but non-maximum sentence of sixty years for murder. The court appears to have been most influenced by the nineteen-year-old defendant’s fairly extensive juvenile record and status of being on bond for two other crimes when committing the murder.¹⁹⁸

Justices Dickson and Boehm, however, have been steadfast in their reliance on the language and considerations of Appellate Rule 7(B). In *Corbett v. State*, Justice Dickson, writing for the court, upheld the maximum sentence of eighty-five years for murder and robbery. In *Corbett*, as in the cases discussed above,

188. 755 N.E.2d 1078 (Ind. 2001).

189. *Id.* at 1084.

190. 762 N.E.2d 1208 (Ind. 2002).

191. *Id.* at 1216.

192. *Id.* at 1217.

193. *See id.*; *see also* IND. CODE § 35-38-1-7.1 (1998).

194. 769 N.E.2d 1128 (Ind. 2002).

195. *Id.* at 1136.

196. *Id.*

197. 755 N.E.2d 576 (Ind. 2001).

198. *Id.* at 579.

the court makes no mention of the worst offense/worst offender principle. However, the facts recounted appear to place the case within its ambit. “[T]he defendant smashed Edwin Massengill’s skull with repeated blows of a sledgehammer. As Massengill lay dying, the defendant rummaged through the house stealing a handgun, two rifles, and the victim’s wallet. The defendant has prior convictions of burglary and grand theft.”¹⁹⁹

Similarly, Justice Boehm’s opinion in *McCann v. State*²⁰⁰ upheld a 100-year sentence for attempted murder, burglary, and attempted rape with relatively few words that addressed the considerations of Appellate Rule 7(B).

The “nature of the offense” is breaking into a home to attack a pregnant woman in her bed and then shooting her boyfriend when he tried to come to her aid. Under “character of the offender,” *McCann* had a lengthy criminal history including over fifteen arrests, one of which was for breaking into a woman’s house and sexually assaulting her.²⁰¹

Chief Justice Shepard, however, earned the brevity award in the realm of substantive sentence review. After reciting the defendant’s contention and the language of Appellate Rule 7(B), the opinion in *Bailey v. State*²⁰² upheld the maximum sentence of eighty-five years for murder and aggravated battery in a single sentence: “In light of the brutal nature of Bailey’s attacks on Hudson and Godsey, we cannot say that an eighty-five year sentence was manifestly unreasonable.”²⁰³ Similarly, after reciting the defendant’s contention of manifest unreasonableness in *Brown v. State*²⁰⁴ the court upheld another maximum sentence, noting “[i]n light of the nature of Brown’s neglect and her stunning lack of remorse following the incident, a twenty-year sentence is hardly unreasonable.”²⁰⁵

The exception to the varying degrees of terseness in these opinions, in which mostly maximum sentences were upheld, is *Buchanan v. State*.²⁰⁶ *Buchanan* was convicted of molesting a five-year-old girl for whom he babysat in an episode in which he photographed her naked and “licked her private area.”²⁰⁷ The court, in an opinion written by Justice Dickson, began by noting that even when a trial court “may have acted within its lawful discretion in imposing a sentence, article 7, section 4 of the Indiana Constitution authorizes independent appellate review and revision of a sentence imposed by a trial court.”²⁰⁸ The court reiterated that “the maximum possible sentences are generally most appropriate for the worst

199. *Id.* at 632.

200. 749 N.E.2d 1116 (Ind. 2001).

201. *Id.* at 1122.

202. 763 N.E.2d 998 (Ind. 2002).

203. *Id.* at 1005.

204. 770 N.E.2d 275 (Ind. 2002).

205. *Id.* at 282.

206. 767 N.E.2d 967 (Ind. 2002).

207. *Id.* at 969.

208. *Id.* at 972.

offenders”²⁰⁹ and offered an explanation of what that means:

This is not . . . a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.²¹⁰

The court then reviewed the relevant factors of the defendant’s character and nature of the offense in some detail, noting that he was in a position of trust with the victim, had videotaped her nude, had been found to be a sexually violent predator, and had a significant criminal record.²¹¹ However, the crime was a one-time occurrence and did not involve excessive physical brutality or the use of a weapon and did not result in physical injury. The offense was not part of a protracted episode of molestation but a one-time occurrence. The court noted that the presumptive sentence for A felony child molesting was thirty years, with a range of twenty to fifty years.²¹² Because the defendant was “not within the class of offenders for whom the maximum possible sentence is appropriate,” the court revised the sentence to forty years.²¹³

Buchanan is arguably the most significant of these opinions, not because it reduced a sentence, but because it sheds important light on the court’s reasoning for the reduction, which can be applied in future cases. It clearly signals that the appellate court’s role is not simply to review what the trial court did and the statutory considerations prescribed for sentencing hearings in the trial court. Rather, Article VII mandates an “independent” appellate review of the sentence imposed by the trial court,²¹⁴ and Appellate Rule 7(B) dictates that the “nature of the offense” and “character of the offender” are the relevant criteria to be weighed in this review. Moreover, *Buchanan* teaches that it is not proper to envision hypothetical scenarios of hideous crimes or despicable criminals in addressing these.²¹⁵ Moreover, unlike the other opinions in which a maximum sentence was imposed, it recites and applies the principle that “the maximum possible sentences are generally most appropriate for the worst offenders.”²¹⁶

209. *Id.* at 973. Two of the three cases cited in support of this proposition couch the principle in terms of the “worst offenses and worst offenders.” See *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998); *Bacher v. State*, 686 N.E.2d 791, 802 (Ind. 1997).

210. *Buchanan*, 767 N.E.2d at 973.

211. *Id.*

212. *Id.*

213. *Id.* at 974.

214. *Id.* at 972.

215. *Id.* at 973 (“Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the *class* of offenses and offenders that warrant the maximum punishment.”).

216. *Id.*

It may have been clear that the offenders in the other cases fall within this class—or the defendants in those cases may not have urged the court to apply this principle—but the seemingly cursory treatment does give rise to the possibility for inconsistency if the court sometimes requires a sentence to be “manifestly unreasonable” and other times merely requires that the defendant be just short of “the worst offender.”

B. Indiana Court of Appeals

The court of appeals addressed several claims for substantive sentence review, but very few of these were found worthy of revision. As the decisions summarized below suggest, however, at least some progress was made in clarifying the appellate court’s role in sentence revision and the standards to be applied. Agreement among panels of the court about this role, and the consistent application of standards or principles, however, still appears to be some distance away.

First, the court of appeals has taken a slightly different approach to the worst offense/worst offender principle. In *Brown v. State*,²¹⁷ the court of appeals upheld the maximum sentence of 130 years for a six-time-felon defendant who repeatedly molested a seven-year-old girl, infected her with a venereal disease, and expressed no remorse.²¹⁸ Although Brown argued the maximum sentence was not appropriate because he was not a worst offender nor had committed a worst offense, the court of appeals did not apply that principle but rather watered it down: “We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.”²¹⁹ The court reasoned that a literal reading of the worst offense/worst offender principle would require it “to compare the facts of the case before us with either those of other cases that have been previously decided, or—more problematically—with hypothetical facts calculated to provide a “worst-case scenario” template against which the instant facts can be measured.”²²⁰ Under such an approach, the court concluded that the maximum sentence would never be justified because one could always envision a worse set of facts surrounding an offense.²²¹

In applying its modified approach, the court noted that Brown was a “career criminal” who had repeatedly molested his victim, with whom he occupied a position of trust, and infected her with a venereal disease.²²² He expressed no remorse and was “involved in illegal drug usage” at the time of the offenses.²²³

217. 760 N.E.2d 243 (Ind. Ct. App. 2002).

218. *Id.* at 247-48.

219. *Id.* at 247.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 247-48.

Although "one can imagine facts that might be worse," the court affirmed the maximum 130-year sentence because it was "not plainly, clearly, and obviously unreasonable."²²⁴

In *Hildebrant v. State*,²²⁵ another child molesting case decided five months later, a different panel upheld the imposition of consecutive, twelve-year sentences in a case in which the trial court had found several aggravating and no mitigating circumstances. Although the court noted that Article VII of the Indiana Constitution "authorizes independent appellate review and review of a sentence imposed by the trial court,"²²⁶ it placed a heavy emphasis on the sentencing statute as providing crucial guidance. First, it observed that the presumptive sentence is "the starting point for any court's consideration of the sentence which is appropriate for the crime committed."²²⁷ The court said little else about how to assess the gravity of an offense beyond looking at the statute that defines the classification of the offense, e.g., a Class B felony in that case.²²⁸ Notably, the court did not cite or mention *Brown* or its formulation as relevant to this inquiry. Rather, the court focused on the "character of the offender" and summarized the relevant criteria as the statutory factors, which are "an assortment of general and specific, mandatory and discretionary considerations" that must first reviewed by the trial court at sentencing "then reviewed again if at issue on appeal."²²⁹

In upholding the two twelve-year consecutive sentences for sexual misconduct with a minor, the court distinguished the case from *Walker v. State*,²³⁰ in which consecutive forty-year sentences were ordered served concurrently "because the two separate counts of child molestation were identical, involved the same child, and there was no physical injury."²³¹ Instead, the court observed that Hildebrant's twelve-year sentences were "just two years more than the presumptive sentence of ten years" and not manifestly unreasonable "[i]n light of the well-documented aggravating circumstances and complete lack of mitigating circumstances in this case."²³²

In *King v. State*,²³³ a fractured panel affirmed the maximum three-year sentence imposed on a defendant who stole twenty-two cartons of cigarettes while out on bond for another offense. Judge Mattingly-May, joined by Judge Baker, affirmed the sentence in relatively short order, recounting the defendant's extensive misdemeanor criminal history and applying a highly deferential standard for reduction, i.e., that the sentence imposed be "clearly, plainly, and

224. *Id.* at 248.

225. 770 N.E.2d 355 (Ind. Ct. App. 2002).

226. *Id.* at 360.

227. *Id.* at 361.

228. *Id.*

229. *Id.*

230. 747 N.E.2d 536 (Ind. 2001).

231. *Hildebrandt*, 770 N.E.2d at 364.

232. *Id.*

233. 769 N.E.2d 239 (Ind. Ct. App. 2002).

obviously unreasonable.”²³⁴

In a thorough and well-reasoned concurring opinion, Judge Najam traced the history of the “manifestly unreasonable” standard and recent supreme court authority applying it.²³⁵ He recounted that the Indiana Constitution was amended in 1970 “to expand the role of appellate [sentence] review, not restrict it,” and the 1997 amendment to Appellate Rule 17(B) (now 7(B)) further sought to allow “more meaningful” appellate review of sentences.²³⁶ In his view, the “clearly, plainly, and obviously unreasonable” standard distorts the rule in light of the 1997 amendment and as a grammatical matter.²³⁷ Moreover, he noted that the supreme court has not consistently applied that standard, as Chief Justice Shepard, and Justices Sullivan, Rucker, and former Justice Selby have never written an opinion using that standard.²³⁸ Harkening back to the language of the rule, Judge Najam posited that “[t]he question is whether the sentence is excessive, that is, whether the punishment fits the crime and the criminal.”²³⁹ This “constitutional duty” of the appellate court requires it to “determine whether in our judgment the sentence is appropriate for the defendant under the circumstances of the case.”²⁴⁰ The three-year sentence imposed on King was neither excessive nor “manifestly unreasonable in light of the nature of the offense and the character of the offender”; therefore, he would affirm.²⁴¹

In each of these three cases, different panels took quite different approaches in addressing, and ultimately rejecting, the sentencing claims. Standing alone, this is not a cause for concern, assuming that the same result is achieved regardless of the approach taken. However, applying the highly deferential “clearly, plainly, and obviously” unreasonable standard of *King* in one case while applying the undiluted worst offense/worst offender principle in another with similar facts will lead to different results at least some of the time. Beyond this, the variety of approaches presents challenges to appellate counsel, who must sort through the various approaches and fashion an argument without knowing which judges will be sitting on the panel.

One need not look any further than the cases in which a defendant’s sentence was revised under Appellate Rule 7(B) to see what a difference the court’s approach can make.²⁴² In *Borton v. State*,²⁴³ a unanimous panel reduced a maximum fifty-year sentence for conspiracy to commit robbery to the

234. *Id.* at 240.

235. *Id.* at 241 (Najam, J., concurring).

236. *Id.* (Najam, J., concurring).

237. *Id.* at 242.

238. *Id.* at 243.

239. *Id.*

240. *Id.*

241. *Id.*

242. Despite the language of the rule, which expressly allows the court to “revise” a sentence, the court of appeals will occasionally order remand to the trial court for resentencing after finding a violation of Rule 7(B). See *Lewis v. State*, 759 N.E.2d 1077, 1087 (Ind. Ct. App. 2001).

243. 759 N.E.2d 641 (Ind. Ct. App. 2002).

presumptive term of thirty years, citing the worst offense/worst offender principle.²⁴⁴ The court based its decision on Borton's youthful age and his minimal criminal history, which was limited to nonviolent juvenile adjudications.²⁴⁵ Similarly, although the aggregate sentence of 190 years in *Haycraft v. State*²⁴⁶ was not the maximum sentence, the court of appeals nevertheless reduced it to 150 years because the defendant was "some distance from [having committed] the worst offense of [being] the most culpable offender."²⁴⁷

C. *The Amended Rule*

Some of the concerns arising from the manner in which the supreme court and court of appeals address claims under Appellate Rule 7(B) may vanish or change in light of an amendment to that rule. In July 2002, the supreme court amended Rule 7(B), effective January 1, 2003. The amended rule eliminates the "manifestly unreasonable" language and appears to relax the standard by allowing revision "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."²⁴⁸ Although the same factors—the nature of the offense and the character of the offender—remain the relevant inquiries, future cases will have to flesh out (1) what constitutes "due consideration of the trial court's decision," a factor not mentioned in the old rule, and (2) what makes a sentence "inappropriate."

By its specific reference to the consideration of the "trial court's decision," the amended rule arguably alters the calculus or suggests the trial court is entitled to greater deference. However, the court will have to define what it means by "decision": does this refer merely to the aggregate number of years imposed or to the trial court's reasoning, such as the finding and weighing of aggravating and mitigating circumstances? If it is the latter, one might expect trial courts to explain their decisions in more detail, possibly applying sentencing principles from case law or making analogies with those sentencing decisions. This may well lead to greater consistency at the trial level and reduce the need for appellate review in many instances.

However, the amended requirement that a sentence merely be "inappropriate" rather than "manifestly unreasonable" suggests a significant relaxing of the standard regardless of the sentence imposed by the trial court. The change would appear to put to rest the "clearly, plainly, and obviously unreasonable" standard that has been frequently applied and occasionally, as in Judge Najam's concurring opinion in *King*, maligned.²⁴⁹ Nevertheless, it remains

244. *Id.* at 648.

245. *Id.*

246. 760 N.E.2d 203 (Ind. Ct. App. 2001).

247. *Id.* at 214 (quoting *Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001)).

248. IND. APP. R. 7(B) (2003).

249. *See supra* notes 236-37.

to be seen what role sentencing principles, particularly the worst offense/worst offender principle, will play under the amended rule. If sentencing disparity is to be reduced, principles must be evenly and consistently applied, and factual comparisons between cases, such as the supreme court did extensively in its first foray into sentence revision in *Fointno v. State*,²⁵⁰ must have a role.

The Indiana Constitution was amended over three decades ago to achieve some degree of consistency in sentencing around the state.²⁵¹ The road has not been an easy one, and the amended rule will surely present new challenges to the appellate courts, trial courts, and counsel. The laudable goal, however, remains both within reach and well worth the effort.

250. 487 N.E.2d 140 (Ind. 1986).

251. See generally Schumm, *supra* note 146, at 667, 669.



SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION: NATIONAL TRENDS AND DEVELOPMENTS

This survey period was marked by incremental change—as opposed to major revision—in the area of employment law. Whether primarily representing employees or employers in employment cases, practitioners will find this year’s developments a “mixed bag.” From the plaintiff-employee perspective, good news came largely in procedural rulings, most notably the United State Supreme Court’s generous application of the “continuing violation doctrine” in harassment cases.¹ Employer-defendants, on the other hand, will find comfort in the Court’s rejection of Department of Labor regulations relating to notice requirements under the FMLA² and decisions further narrowing the scope of “disability” or “reasonable accommodation” under the ADA.³

Regardless of one’s perspective, this remains an area of the law where it is important to keep abreast of new developments—which seem to occur on an almost weekly basis. In the discussion below, we analyze the most notable new cases handed down during the survey period, including decisions under Title VII, the ADA, ADEA, FMLA, and related state laws. We close with our “watch list”: cases pending before the U.S. Supreme Court that may generate significant new rulings during the *next* survey period.

I. TITLE VII

A. Continuing Violation Doctrine

Under Title VII, an Indiana plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) within 300 days “after the alleged unlawful employment practice occurred.”⁴ In June 2002, the United States Supreme Court issued an important decision in *National Railroad Passenger Corp. v. Morgan*,⁵ addressing whether, and under what circumstances,

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1. Nat’l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002).

2. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002).

3. E.g., Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002); U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

4. 42 U.S.C. § 2000e-5(e)(1) (1994 & Supp. V 1999).

5. 122 S. Ct. 2061 (2002).

a Title VII plaintiff may sue on events that occurred outside the statutory time period.

Plaintiff Abner Morgan filed a charge claiming that, during his employment at Amtrak, he was harassed and disciplined more harshly than other employees based on his race.⁶ Some of the acts of which he complained occurred more than 300 days before the date he filed his EEOC charge.⁷ Amtrak sought summary judgment on all incidents that fell outside the 300 day filing period.⁸

The U.S. Supreme Court noted that there was a split among the appellate courts on how to handle acts outside of the statutory filing period.⁹ Looking to the Title VII wording that "[a] charge under this section *shall be filed* within [300 days] *after the alleged unlawful employment practice occurred*," the Court held that discrete acts, although related, could not be converted into a single unlawful practice for purposes of timely filing.¹⁰

After analyzing case history, the Court stated several important principles. The first was that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock"¹¹ The Court did, however, hold that the statute would not bar an employee from using prior acts as background evidence to support a timely claim.¹² Moreover, the filing time period is subject to the equitable doctrines of tolling and estoppel.¹³ The Court reasoned that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"¹⁴

The Court reached a different conclusion, however, on the issue of hostile environment claims.¹⁵ The Court distinguished these types of claims because, by their nature, they involve repeated conduct.¹⁶ Because a hostile work environment claim is comprised of a series of acts that add up to a single unlawful employment practice, the Court concluded that if one act contributing to the claim occurred within the filing period, the Court could consider the entire time period of the alleged hostile environment in determining liability.¹⁷ Therefore, in order for a charge of hostile environment to be timely, the employee need only file the charge within 300 days of any act that is part of a

6. *Id.* at 2068.

7. *Id.*

8. *Id.*

9. *Id.* at 2069.

10. *Id.* at 2070-71 (emphasis supplied by the court).

11. *Id.* at 2072.

12. *Id.*

13. *Id.*

14. *Id.* at 2073.

15. *Id.*

16. *Id.*

17. *Id.* at 2074.

hostile work environment.¹⁸

A court must, therefore, look at alleged acts that make up a hostile environment and consider events preceding the limitations period if they are part of the same actionable hostile work environment practice.¹⁹ Plaintiff Morgan cited incidents involving the same type of employment actions which occurred with relative frequency and were perpetrated by the same managers.²⁰ The conduct outside the limitations period was not, therefore, time-barred because all the acts making up the claim qualified as part of the same employment practice and at least one act fell within the statutory time period.²¹

The Court left the door open for employers faced with situations where the plaintiff unreasonably delayed in filing a charge.²² Employers may raise equitable defenses such as laches, which in the Title VII context requires proof of a lack of diligence by the plaintiff and prejudice to the employer.²³

B. Disparate Treatment Cases

1. *"Lost Chance" Theory*.—Two cases based on disparate treatment theories gave the Seventh Circuit opportunities to decide issues of first impression. In the first case, the court borrowed from tort law principles and applied a "lost chance" theory in calculating a back pay award.²⁴ The court noted at the outset that the procedural posture of the case was a bit unusual because it was brought by white male applicants who successfully alleged race and gender discrimination in hiring and promotion by the Illinois State Police (ISP).²⁵ These men prevailed in their reverse discrimination case by proving that ISP's affirmative action plan was not narrowly tailored to meet a compelling governmental interest.²⁶ Three of these plaintiffs appealed the calculation of their back pay award.²⁷

The district court judge took the novel approach of calculating back pay by evaluating the likelihood that each individual would have received a promotion.²⁸ He then awarded back pay on a proportional basis.²⁹ The plaintiffs argued that each should receive the full amount of recovery, and that the burden of proof on the damages issue rested with ISP.³⁰ In effect, they argued that it was ISP's burden to prove by clear and convincing evidence that each of the plaintiffs

18. *Id.* at 2075.

19. *Id.* at 2076.

20. *Id.*

21. *Id.* at 2077.

22. *Id.* at 2076.

23. *Id.* at 2077.

24. *Bishop v. Gainer*, 272 F.3d 1009 (7th Cir. 2001).

25. *Id.* at 1011.

26. *Id.*

27. *Id.* at 1015.

28. *Id.*

29. *Id.*

30. *Id.*

would have failed to receive a promotion absent the reverse discrimination.³¹

The Seventh Circuit said the plaintiffs "ask[ed] too much."³² The court cited *Doll v. Brown*,³³ where the court discussed the hypothetical situation of multiple candidates for a single promotion.³⁴ If four out of five applicants for a single job were discriminated against, and all were equally qualified, it would be obviously wrong to award all four back pay, give one the job, and allow the other three front pay as well. Because the issue was novel and had not been briefed in *Doll*, the court did not hold that the lost chance theory was available in employment discrimination cases but "commend[ed] it to the consideration of bench and bar as a possible method of arriving at more just and equitable results in cases such as this."³⁵

Here, the district judge evaluated the chances of two of the plaintiffs who had been competing for the same job and who placed third and fourth on the promotion list. He assigned one plaintiff a forty-five percent likelihood of success and the other a thirty percent likelihood.³⁶ The third plaintiff competed for a promotion with two other white males who occupied positions higher on the promotion list, so the judge assessed his chances at fifteen percent.³⁷

The Seventh Circuit noted that this approach "involves more art than science," but observed that this is also true of comparative negligence calculations and, in situations such as this, is the likeliest way to produce a just result.³⁸ It found "no reason to disturb the thoughtful calculations" of the district court judge.³⁹

2. *Comparative Qualifications*.—The second disparate treatment case offering the Seventh Circuit an issue of first impression was *Millbrook v. IBP, Inc.*⁴⁰ The question presented was when evidence of comparative qualifications supports a jury verdict of discrimination. Millbrook was a janitor at a meat processing plant who claimed that he suffered discrimination based on race when he was passed over for promotion to quality control inspector.⁴¹ A jury awarded him \$7500 in pain and suffering, \$25,000 in lost wages, and \$100,000 in punitive damages.⁴²

IBP required that its quality control inspectors have strong communication skills because their job duties often brought them into confrontation with

31. *Id.*

32. *Id.* at 1016.

33. 75 F.3d 1200 (7th Cir. 1996).

34. *Bishop*, 272 F.3d at 1016.

35. *Id.* (quoting *Doll*, 75 F.3d at 1207).

36. *Id.* at 1016.

37. *Id.*

38. *Id.* at 1016-17.

39. *Id.* at 1017.

40. 280 F.3d 1169 (7th Cir. 2002).

41. *Id.* at 1172.

42. *Id.*

production supervisors.⁴³ Millbrook applied without success for an inspector position eight different times.⁴⁴ The jury concluded that another applicant was better qualified on seven of the eight occasions but found discrimination on the eighth claim.⁴⁵

The court began by noting that in evaluating pretext, the question is not whether the employer made a proper evaluation of competing applicants, but whether it used deceit to cover its discriminatory tracks.⁴⁶ IBP justified its hiring decision by explaining that the successful candidate had prior experience in quality control, had superior communication skills to Millbrook, and was more confident in his demeanor.⁴⁷ Millbrook cited subjective comments from interviews such as “shows no real interest,” “no skills experience pertaining to this position,” “gave poor and incomplete answers to questions,” and “lacks ability to answer questions clearly” as demonstration of racial bias.⁴⁸ The court disagreed, finding no evidence that the subjective criteria used in evaluating the candidates was a “mask for discrimination.”⁴⁹ The quoted comments were negative but racially neutral, and at trial IBP offered specific facts in support of the subjective evaluations.⁵⁰ Additionally, similar comments were made about white candidates.⁵¹

The court then revisited its precedent on the issue of when evidence of comparative qualifications, absent other evidence of discrimination, could be sufficient to support a jury verdict of discrimination.⁵² After reviewing holdings in other circuits, the court held that

where an employer’s proffered nondiscriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants’ competing qualifications does not constitute evidence of pretext “unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.” In other words, “[i]n effect, the plaintiff’s credential would have to be so superior to the credentials of the person selected for the job that ‘no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.’”⁵³

43. *Id.*

44. *Id.*

45. *Id.* at 1172-73.

46. *Id.* at 1175.

47. *Id.*

48. *Id.* at 1176.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1179.

53. *Id.* at 1180-81 (quoting *Deines v. Tex. Dep’t of Protective & Reg. Servs.*, 164 F.3d 277,

The court reiterated its often-stated position that its role is not to act as a super personnel department second guessing employers' business judgments.⁵⁴ Applying this standard, the court held that Millbrook could not prevail without providing some affirmative evidence challenging IBP's credibility.⁵⁵ Applying the standard that comparative qualifications do not support a finding of pretext, the court found it "a close question" as to whether Millbrook's qualifications equaled or exceeded those of the successful applicant.⁵⁶ At the end of the day, he failed to sufficiently prove intentional discrimination. Thus, the jury verdict could not stand.⁵⁷ In summary, the court stated, "Title VII is not a merit selection program."⁵⁸

Not all members of the Seventh Circuit would have reached the same conclusion. Five judges voted to grant *en banc* rehearing of the 2-1 decision.⁵⁹

C. Harassment

Three Seventh Circuit opinions issued during the survey period and dealing with claims of harassment are worth comment. In the first, *Gawley v. Indiana University*,⁶⁰ an Indiana University Police Department officer claimed that a senior officer had subjected her to harassment. Among other things, he made offensive comments about her pants being too tight and commented on her breast size when fitting her for a bullet-proof vest.⁶¹ On one occasion, he groped her breast while he was adjusting the vest on her.⁶² Gawley eventually complained but did not at that time mention the breast groping incident.⁶³ The senior officer received a counseling memorandum based on the offensive comments.⁶⁴

The investigation continued after the counseling memorandum's issuance, and the report was eventually watered down to remove many conclusions that criticized the senior officer and the department.⁶⁵ Gawley resigned thereafter and claimed constructive discharge.⁶⁶ She conceded that after the counseling memorandum, the offensive conduct did not reoccur.⁶⁷

In resolving the case, the Seventh Circuit considered the University's

279 (5th Cir. 1999) and *Byrnie v. Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001)).

54. *Id.* at 1181.

55. *Id.* at 1182.

56. *Id.*

57. *Id.* at 1184.

58. *Id.*

59. *Id.* at 1169.

60. 276 F.3d 301 (7th Cir. 2001).

61. *Id.* at 305-06.

62. *Id.* at 306.

63. *Id.*

64. *Id.*

65. *Id.* at 307.

66. *Id.*

67. *Id.* at 311-12.

affirmative defense under *Ellerth*⁶⁸ and *Faragher*,⁶⁹ that it exercised reasonable care to prevent and correct sexually harassing behavior in a prompt manner, and that Gawley unreasonably failed to take advantage of the corrective opportunities the University provided.⁷⁰ The conduct by the senior officer that Gawley characterized as harassment covered a span of about seven months.⁷¹ She waited another seven months before pursuing a formal complaint through the University's procedures.⁷² As soon as she availed herself of these procedures, the University took action that stopped the harassment.⁷³ The Seventh Circuit therefore affirmed summary judgment in favor of the University because Gawley unreasonably failed to take advantage of available corrective procedures.⁷⁴

Approximately a week after the *Gawley* decision, the Seventh Circuit handed down its opinion in *Hall v. Bodine Electric Co.*⁷⁵ Hall, a machine operator, complained that some of her coworkers had harassed her when one pulled her sleeveless blouse and t-shirt away from her body, exposing her breasts, and another commented on the size of her nipples.⁷⁶ During the investigation of that incident, Hall cited other instances of what she considered inappropriate sexual conduct that she had not previously reported.⁷⁷

The company's human resources manager interviewed eighteen people, including all those identified as potential witnesses and others stationed in the area of the alleged incident.⁷⁸ He took handwritten notes during these interviews, and then typed them into his computer and shredded the handwritten notes each day.⁷⁹ He concluded that not only had one of Hall's coworkers violated the company rules prohibiting sexual harassment, but also that Hall was guilty of similar violations.⁸⁰ The company discharged both employees.⁸¹

In the ensuing lawsuit, Hall pointed to the human resources manager's failure to preserve his handwritten notes as evidence that the investigation was a "sham" to dummy up a reason to fire her.⁸² The court disagreed, noting that employers are not required to keep every scrap of paper and that it is sufficient to retain the actual employment record itself.⁸³ The investigator's reasons for disposing of the

68. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

69. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

70. *Cawley*, F.3d at 311.

71. *Id.* at 312.

72. *Id.*

73. *Id.*

74. *Id.*

75. 276 F.3d 345 (7th Cir. 2002).

76. *Id.* at 351.

77. *Id.*

78. *Id.* at 352.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 358.

83. *Id.*

handwritten notes was that they were very rough and duplicative of the typed version, and that he wanted to preserve confidentiality.⁸⁴ The court found all those reasons "entirely plausible."⁸⁵

Moreover, the investigator's final report noted that eight of sixteen witnesses interviewed described mutually inappropriate behavior between the two terminated employees.⁸⁶ Witnesses said that the two touched each other in a playful, sexual manner on numerous occasions, constantly told sexual jokes, and often made graphic sexual comments to each other.⁸⁷ Hall attempted to argue that her conduct might have been inappropriate but fell short of Title VII sexual harassment. The court was unpersuaded, however, and said that "an employee's complaint of harassment does not immunize her from being subsequently disciplined or terminated for inappropriate workplace behavior."⁸⁸ In fact, the court went on to say, failure to terminate Hall would probably have constituted a Title VII violation in the form of sex discrimination against the other offender.⁸⁹

Less than a week after the *Hall* decision, the Seventh Circuit handed down *Longstreet v. Illinois Department of Corrections*.⁹⁰ Longstreet complained of two incidents within a thirty-day period, the first involving another officer who masturbated in front of her and the second involving a fellow officer who allegedly rubbed his penis against Longstreet's buttocks.⁹¹ The court noted that both incidents, if proven, would be "close to 9's on a scale of 10," but also noted that, because the offenders were coworkers, the employer would only be liable if it negligently failed to take steps to remedy the illegal harassment.⁹²

Longstreet attempted to prove negligence by showing that both offenders had harassed others before her. The court found only one prior offense with "any potential legal meat."⁹³ The alleged masturbator apparently offered another female officer specified amounts of money for sexual acts. When the officer complained, the miscreant was reassigned so that his target did not have to work with him again.⁹⁴

In evaluating whether the Department of Corrections had acted negligently, the Seventh Circuit found that the its response to the earlier incident was "not obviously unreasonable."⁹⁵ Moreover, the court declined to find employers strictly liable for every second incident of harassment committed by any

84. *Id.*

85. *Id.*

86. *Id.* at 359.

87. *Id.*

88. *Id.*

89. *Id.*

90. 276 F.3d 379 (7th Cir. 2002).

91. *Id.* at 381.

92. *Id.*

93. *Id.* at 382.

94. *Id.*

95. *Id.*

employee, particularly when the first incident was much less serious than the second. The court also noted that the case might come out differently had there been other non-hearsay complaints of harassment preceding Longstreet's complaint. However, a rule imposing strict liability on an employer whenever an employee committed a second act of harassment would force employers to discharge first-time offenders in all harassment cases.⁹⁶

Longstreet also claimed that her reassignment to a different duty station was in retaliation for her complaints about harassment. This claim failed because the only evidence she offered of a connection between the complaint and the reassignment was timing.⁹⁷ The Court held, "[T]he transfer occurred 4 months after the second complaint. This is insufficient."⁹⁸

D. Retaliation

1. Protected Activity.—In order to establish a prima facie case of retaliation under Title VII, a plaintiff must show that she engaged in statutorily protected expression, that she suffered an adverse employment action, and that there is a causal link between the protected expression and the adverse action.⁹⁹ During the survey period, the Seventh Circuit issued two opinions dealing with the definition of what qualifies as statutorily protected expression. In the first, *Worth v. Tyler*, the plaintiff claimed that over a two-day period her supervisor brushed up against her; stared at her breasts; stroked her face, hair, nose, backside, and leg; and put his hand down her dress and placed it on her breast for several seconds.¹⁰⁰ On the following day, Worth reported these actions to the local police department. She received a call the next day terminating her employment arrangement "in light of the recent circumstances."¹⁰¹ She later filed an EEOC complaint and subsequently brought suit.¹⁰²

The defendants argued that Worth had not shown that she engaged in a protected activity, because she was fired before she complained to the EEOC, and her police report did not qualify as statutorily protected expression.¹⁰³ The Seventh Circuit disagreed, quoting Title VII's provision that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ."¹⁰⁴ The Seventh Circuit concluded that Worth's police report fell within this "opposition" clause.¹⁰⁵

96. *Id.* at 383.

97. *Id.* at 384.

98. *Id.* (citing *Sauzek v. Exxon Coal USA*, 202 F.3d 913 (7th Cir. 2000)).

99. *Worth v. Tyler*, 276 F.3d 249, 265 (7th Cir. 2001).

100. *Id.* at 257.

101. *Id.*

102. *Id.* at 265-56.

103. *Id.* at 265.

104. *Id.* (quoting 42 U.S.C. § 2000e-3(a) (1994 & Supp. V 1999)).

105. *Id.*

The defendants offered evidence that the adverse employment action—i.e., Worth's discharge—was for a legitimate nondiscriminatory reason, but Worth countered that the statement that her firing was "in light of recent circumstances" constituted direct evidence that this reason was pretextual.¹⁰⁶ The supervisor lost credibility by initially denying that he ever touched the plaintiff in any manner, then later admitting that this denial was a lie.¹⁰⁷ The Seventh Circuit concluded that the jury's finding of retaliation was not clearly erroneous, so the district court did not err when it denied the defendant's motion for judgment as a matter of law.¹⁰⁸

In another retaliation case, *Fine v. Ryan International Airlines*,¹⁰⁹ the airline demoted a female pilot after she failed a mandatory proficiency check.¹¹⁰ She believed the test was rigged to disadvantage women, and five months later she and three female coworkers wrote a letter to management complaining that the airline treated female pilots inequitably.¹¹¹ The following month the airline discharged her after she experienced difficulty scheduling training that she needed to become eligible for promotion back to her previous position.¹¹²

The district court granted summary judgment to the airline on Fine's claims of sexual harassment and sex discrimination but allowed the claim of retaliation to go to a jury.¹¹³ The jury awarded Fine \$6000 in compensatory damages and \$3.5 million in punitive damages, which the district court reduced to the statutory cap of \$300,000.¹¹⁴

On appeal, the airline argued that the court should have been granted judgment as a matter of law in its favor on grounds that Fine did not "reasonably [believe] in good faith that the practice she opposed violated Title VII."¹¹⁵ The Seventh Circuit paraphrased the airline's position as follows: "How . . . could Fine reasonably have believed she was complaining about discrimination when the district court found that she was not discriminated against as a matter of law?"¹¹⁶ This argument missed the target, the court held, because it is only permissible to retaliate against someone who claims a Title VII violation if the claim is "completely groundless."¹¹⁷ To be groundless, a claim must rest on facts that no reasonable person could possibly construe as a case of discrimination. The fact that a claim ultimately proves unsuccessful does not, therefore, mean

106. *Id.* at 265-66.

107. *Id.* at 266.

108. *Id.* at 266-67.

109. 305 F.3d 746 (7th Cir. 2002).

110. *Id.* at 749.

111. *Id.*

112. *Id.*

113. *Id.* at 751.

114. *Id.*

115. *Id.* at 752 (quoting *Alexander v. Gerhardt Enters., Inc.*, 40 F.3d 187, 195 (7th Cir. 1994)).

116. *Id.*

117. *Id.* (quoting *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996)).

that it was not protected activity.¹¹⁸

On the record presented, the court could not conclude as a matter of law that Fine had no grounds whatsoever for believing that she had suffered sex discrimination.¹¹⁹ Among other things, none of her male counterparts experienced similar delays in scheduling training, and two other women who failed proficiency checks also believed that the tests were manipulated in an effort to demote female pilots.¹²⁰ Fine was called a “whiner” after she complained of sexual harassment and was treated differently from a male pilot when they asked to see their personnel files.¹²¹ In the end, “[t]here was enough evidence for the jury to find that Fine had a good-faith objectively reasonable belief that Ryan was discriminating against her on the basis of her sex,” and the court declined to disturb that finding.¹²²

2. *Summary Judgment Standard*.—In *Stone v. City of Indianapolis Public Utilities Division*,¹²³ the court affirmed summary judgment against the *pro se* plaintiff without discussion or analysis, but it took the opportunity to clarify the standard for summary judgment when a plaintiff claims that he suffered retaliation based on a complaint of employment discrimination.¹²⁴ Plaintiffs in such cases may survive summary judgment using either of two approaches.¹²⁵ The more straightforward approach is to present direct evidence that he engaged in protected activity and suffered the adverse employment action as a result.¹²⁶ If he makes that showing, and it is uncontradicted, the plaintiff is entitled to summary judgment.¹²⁷

If the defendant contradicts this evidence, the case will go to a jury unless the defendant presents unrefuted evidence that it would have taken the same action against the plaintiff even absent no retaliatory motive.¹²⁸ In this latter scenario, the defendant is entitled to summary judgment because the plaintiff was not harmed by any retaliation that may have occurred.¹²⁹ There is no bright line rule as to how much evidence the plaintiff must present when using this approach, but “mere temporal proximity” between the time of filing of the charge of discrimination and the allegedly retaliatory adverse employment action will rarely be enough, standing alone, to create a triable issue.¹³⁰

The second approach that a plaintiff may employ to survive summary

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 753.

123. 281 F.3d 640 (7th Cir. 2002).

124. *Id.* at 642.

125. *Id.* at 644.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (citations omitted).

judgment is the adaptation of *McDonnell Douglas*¹³¹ to the retaliation context.¹³² In this approach, the plaintiff must show that after filing the charge or engaging other protected activity, he alone, and not any other employee similarly situated who did not file a charge, suffered an adverse employment action despite satisfactory performance.¹³³ If the defendant presents no rebuttal evidence, the plaintiff is entitled to summary judgment. If the defendant presents un rebutted evidence of a legitimate nondiscriminatory reason for the action, the defendant is entitled to summary judgment. Otherwise, the question goes to a jury.¹³⁴

This case will help practitioners because it clarifies the prima facie case elements and the burdens of proof for retaliation claims in the Seventh Circuit. In particular, it clarifies how causation plays into each of the two alternative approaches to establishing Title VII retaliation.

II. PROCEDURAL ISSUES

A. *United States Supreme Court Holdings*

During the survey period, the United States Supreme Court settled three procedural issues in the area of employment law. Perhaps the most significant decision came in *EEOC v. Waffle House, Inc.*¹³⁵ The question presented was whether an agreement between an employer and an employee to arbitrate employment-related disputes would serve to bar the EEOC from pursuing such victim-specific judicial relief as back pay, reinstatement, and damages.¹³⁶

Waffle House required all prospective employees to sign an application that provided for mandatory arbitration of any dispute or claim concerning their employment. Employee Eric Baker signed the application, began working as a grill operator, and sixteen days later suffered a seizure at work. Waffle House discharged him soon after the seizure. He never initiated arbitration proceedings, but he did file a timely EEOC charge alleging a violation of the Americans With Disabilities Act (ADA).¹³⁷

The Fourth Circuit Court of Appeals concluded that the agreement did not prevent the EEOC from bringing an enforcement action because the EEOC was not a party to the contract and had independent statutory authority to bring suit.¹³⁸ However, the court said that the EEOC was precluded from seeking victim-specific relief, in order to give effect to the policy goals expressed in the Federal Arbitration Act.¹³⁹

131. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

132. *Stone*, 281 F.3d at 644.

133. *Id.*

134. *Id.*

135. 534 U.S. 279 (2002).

136. *Id.* at 282.

137. *Id.* at 282-83.

138. *Id.* at 284.

139. *Id.*

The U.S. Supreme Court, in a 6-3 decision,¹⁴⁰ resolved a circuit split on this question.¹⁴¹ The Court reviewed the history of Title VII and the Federal Arbitration Act, and noted that the Federal Arbitration Act directs courts to enforce arbitration agreements as they do other contracts, but it does not require parties who have not agreed to arbitrate to do so.¹⁴² The Court also noted that when the EEOC does pursue victim-specific relief absent any arbitration agreement, it is "in command of the process" because it has exclusive jurisdiction over the claim for a period of time, and the employee may not prosecute the claim until the agency issue a right-to-sue letter.¹⁴³ If the EEOC chooses to file suit on its own, the employee has no independent cause of action, although she may intervene in the EEOC suit.¹⁴⁴

The majority's bottom line was that "a contract cannot bind a nonparty."¹⁴⁵ It concluded that, as to both Title VII and the ADA, the EEOC might be acting in the public interest even when it pursued relief that was entirely victim specific. Because the EEOC's claim was not merely derivative, the employee's arbitration agreement did not stop the agency from bringing an action seeking victim-specific relief.¹⁴⁶

The Court did note that an employee's conduct could limit the relief the EEOC might actually obtain.¹⁴⁷ For example, if Baker had entered into a settlement agreement or failed to mitigate his damages, those actions would limit the recovery available to the EEOC.¹⁴⁸ Otherwise, the employer would be penalized by a double recovery.¹⁴⁹

In contrast to the 6-3 split in *Waffle House*, the U.S. Supreme Court Justices were in perfect harmony in the case of *Swierkiewicz v. Sorema*,¹⁵⁰ which dealt with the pleading requirement in employment discrimination cases. Swierkiewicz, a fifty-three-year-old native of Hungary, claimed national origin and age discrimination based on his termination.¹⁵¹ The district court dismissed his complaint because he did not allege circumstances supporting an inference of discrimination and therefore failed to adequately allege a prima facie case.¹⁵² The Second Circuit Court of Appeals affirmed, and the U.S. Supreme Court granted *certiorari* to resolve a circuit split over the proper pleading standard for

140. *Id.* at 281.

141. *Id.* at 285.

142. *Id.* at 293.

143. *Id.* at 290-91.

144. *Id.* at 291.

145. *Id.* at 294.

146. *Id.* at 296-98.

147. *Id.* at 296.

148. *Id.*

149. *Id.* at 297.

150. 534 U.S. 506 (2002).

151. *Id.* at 508-09.

152. *Id.* at 509.

employment discrimination cases.¹⁵³

The Supreme Court adopted the majority rule that a plaintiff need not plead a *prima facie* case of discrimination under the *McDonnell Douglas* standard to survive a motion to dismiss.¹⁵⁴ Some circuits had held that a complaint was inadequate unless it contained factual allegations supporting each element of the *prima facie* case.¹⁵⁵ The Supreme Court noted that the *McDonnell Douglas* *prima facie* case was an evidentiary standard rather than a pleading requirement.¹⁵⁶ The particular requirements of a *prima facie* case will vary depending on the context of the claim.¹⁵⁷

The employer argued that allowing lawsuits based only on conclusory allegations of discrimination to go forward would burden courts and encourage disgruntled employees to bring unsubstantiated claims.¹⁵⁸ In response, the Court pointed out that the plaintiff had alleged that he had been terminated based on national origin and age in violation of Title VII and the ADEA, had detailed events leading to his termination, had provided relevant dates, and had specified the ages and nationalities of at least some persons involved with his termination.¹⁵⁹ This, the Court held, was sufficient to satisfy liberal principles of notice pleading.¹⁶⁰

The third U.S. Supreme Court decision during the survey period dealing with procedural issues was *Edelman v. Lynchburg College*.¹⁶¹ That case dealt with a challenge to an EEOC regulation that allowed a charging party who had filed on a timely basis to verify that charge after the filing time expired.¹⁶² The Court looked to the purpose of the verification provision, which was designed to "provide some degree of insurance against catchpenny claims of disgruntled, but not necessarily aggrieved, employees."¹⁶³ The Court presumed that Congress did not intend the requirement of an oath or affirmation to change the fundamental nature of Title VII as a remedial scheme in which lay persons, rather than attorneys, initiate the process.¹⁶⁴ Allowing the "relation back" of an oath inadvertently omitted from an original filing would help ensure that uninformed lay complainants would not forfeit their rights.¹⁶⁵ On the other hand, the Court agreed that a verification should be required before an employer will be called

153. *Id.* at 509-10.

154. *Id.* at 510 n.2.

155. *Id.*

156. *Id.* at 510.

157. *Id.* at 512.

158. *Id.* at 514.

159. *Id.*

160. *Id.*

161. 535 U.S. 106 (2002), *aff'd in part, rev'd in part, remanded by* 300 F.3d 400 (4th Cir. 2002).

162. *Id.* at 109.

163. *Id.* at 115.

164. *Id.*

165. *Id.*

upon to respond to a complaint.¹⁶⁶ The Court held, taking both concerns into account, that the EEOC's relation back regulation was a valid and, indeed, "unassailable" interpretation of the statute.¹⁶⁷

B. Seventh Circuit Decisions

Before the U.S. Supreme Court decided *Edelman*, the Seventh Circuit had an opportunity early in the survey period to address a case of first impression in the circuit: whether a district court abused its discretion by dismissing a complaint on the basis that it contained repetitious and irrelevant matter.¹⁶⁸ In *Davis v. Ruby Foods, Inc.*, Davis, a former Dunkin Donuts employee, filed a claim of sexual harassment against a female supervisor.¹⁶⁹ His twenty-page complaint was highly repetitious and included material that Judge Richard Posner characterized as "sometimes charming" (citing the plaintiff's statement that "all federal judges should have their pay by law doubled"), but irrelevant and at times "downright weird."¹⁷⁰ The Illinois District Court dismissed the complaint without prejudice, and Davis did not refile.¹⁷¹ The Seventh Circuit did not fault him for this failure because he was acting *pro se*, noting that the district court did not explain the deficiency that led to the dismissal or how it could be corrected.¹⁷²

The court recognized that Rule 8 of the Federal Rules of Civil Procedure requires a "short and plain statement" with each averment stated in simple, concise, and direct fashion and noted that this complaint failed that test.¹⁷³ Nonetheless, it performed the essential function of a complaint—it put the defendant on notice of the claim.¹⁷⁴ Indeed, the court noted, it gave the employer far more information than the civil rules require, and appeared to state a claim under Federal Rule of Civil Procedure 12(B)(6).¹⁷⁵ The court, therefore, sided with the plaintiff.

The court noted that dismissal of a complaint as unintelligible would be a different matter.¹⁷⁶ It also noted that there were limits on its holding that extraneous matter would not warrant dismissal of a complaint under Rule 8.¹⁷⁷ It cited as an example a Third Circuit dismissal of a complaint that ran 240

166. *Id.*

167. *Id.* at 118.

168. *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 820 (7th Cir. 2001), *on remand, summary judgment entered by* No. 00 C 5578, 2002 U.S. Dist. Lexis 10480 (N.D. Ill. June 11, 2002).

169. *Id.* at 819.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 820.

175. *Id.*

176. *Id.* (citing *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988)).

177. *Id.* at 821.

pages.¹⁷⁸ Judge Posner added one final bit of guidance, advising defense counsel not to move to strike extraneous matter in a complaint unless its presence created some prejudice to the defense.¹⁷⁹

The case of *McCaskill v. SCI Management Corp.*¹⁸⁰ is similarly noteworthy because it offers a remarkable debate over what constitutes a judicial admission. The case involved a provision in an arbitration agreement stating that each party would pay its own costs and attorney's fees, regardless of the outcome of the arbitration. Plaintiff McCaskill argued that this provision improperly limited her ability to vindicate her rights under Title VII.

During oral argument, SCI's attorney conceded that the agreement would be unenforceable if construed to limit the plaintiff's ability to recover attorney's fees under Title VII if she prevailed. Judge Bauer found no need to proceed any further in examining whether Title VII's fee shifting provisions override arbitration agreements because in his view, that verbal admission constituted a binding judicial admission "the same as any other formal concession made during the course of proceedings."¹⁸¹ He therefore concluded that the arbitration clause was unenforceable.¹⁸²

Judge Rovner concurred in the judgment but sharply disagreed with the "unprecedented expansion of the doctrine of judicial admissions."¹⁸³ She described Judge Bauer's opinion that a single comment during oral argument qualified as an assessment of the merits of the client's case as "simply stunning."¹⁸⁴ She noted that this comment occurred in the context of the SCI attorney making an alternative argument, which was that the agreement should not be read as barring an attorneys fee award.¹⁸⁵ The attorney acknowledged at one point, in response to a question, that if the language was read to completely bar attorney's fees, that would be "inconsistent with Title VII."¹⁸⁶

In Judge Rovner's view, this accurate assessment of the weakness of SCI's position was not a concession concerning a fact in issue, but a candid statement of legal opinion.¹⁸⁷ She did not find the comment to be "the sort of deliberate, clear, and unambiguous statement evincing an intentional waiver that has been held sufficient to constitute a judicial admission. She cited *Moose Lodge No. 107 v. Irvis*, where the U.S. Supreme Court said, "We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument."¹⁸⁸ Judge Rovner

178. *Id.* (citing *In re Westinghouse Secs. Litig.*, 90 F.3d 696, 703 (3d Cir. 1996)).

179. *Id.*

180. 298 F.3d 677 (7th Cir. 2002).

181. *Id.*

182. *Id.*

183. *Id.* at 681.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 682 (quoting 407 U.S. 163, 170 (1972)) (other citations omitted).

concurred with Judge Bauer's conclusion, based on her own interpretation of the contract language and its legal implications.¹⁸⁹

The Seventh Circuit dealt more directly with the enforceability of an arbitration contract in *Penn v. Ryan's Family Steak Houses, Inc.*¹⁹⁰ Rather than directly requiring employees to agree to arbitration agreements when they were hired, Ryan's required new hires to execute contracts directly with the arbitration service. The agreement specified that the employer was a third-party beneficiary of the contract. The agreement lacked specifics, and the only responsibility it assigned the arbitration service was that of providing an arbitration forum. Employees who executed the agreements received a copy of rules providing for very restrictive discovery and complete discretion by the arbitrator over the location and time of arbitration proceedings.

The Seventh Circuit declined to evaluate the merits of this system, however, because the employee never entered into an enforceable contract.¹⁹¹ Applying Indiana contract law, the court examined the arrangement for mutuality of obligation.¹⁹² Indiana contracts are unenforceable if they are too vague and indefinite for material provisions to be ascertained, and also if the arrangement fails to obligate one party to do anything.¹⁹³

The court found that the arbitration service did not make enough of a commitment to create mutuality of obligation. Because it was required only to provide an arbitration forum but did not specify the forum or the standards, it could have fulfilled its promise with a coin toss.¹⁹⁴ The arbitration service's contract with the employer might have saved the arbitration provision had it done more to limit the arbitration service's ability to change procedures, but it contained no such provisions. The provision allowing either the employer or the arbitration service to cancel the agreement on ten days' notice was not a sufficient limitation.¹⁹⁵

The court went on to look for mutuality in the employment application itself.¹⁹⁶ Again, it found nothing in Indiana law to support the proposition that a benefit received from a third party (i.e., the offer of employment by the employer) created mutuality.¹⁹⁷ Therefore, the court found the arbitration agreement between the employee and the arbitration service unenforceable without considering the plaintiff's additional argument that he had not knowingly and voluntarily entered into the agreement.¹⁹⁸

An additional survey period Seventh Circuit opinion dealing with procedural

189. *Id.* at 685.

190. 269 F.3d 753 (7th Cir. 2001).

191. *Id.* at 758.

192. *Id.* at 759.

193. *Id.* (citations omitted).

194. *Id.*

195. *Id.* at 760.

196. *Id.*

197. *Id.*

198. *Id.* at 761.

issues is worthy of mention. In *Beckel v. Wal-Mart Associates, Inc.*,¹⁹⁹ the plaintiff filed an untimely charge of sexual harassment against her former employer. She invoked the doctrine of equitable estoppel in an effort to overcome her delinquency, explaining that when she complained to higher-ups at Wal-Mart about harassment by her supervisor, she was told to discuss her allegations with no one outside top management. She said she took this to mean that she could not retain a lawyer or complain to the EEOC without risking her job.

Judge Posner stated, "If the employer merely orders the employee not to talk to anyone except the employer's managers about her allegation of sexual harassment, and she misunderstands this to mean that talking to a lawyer or filing an administrative complaint or a lawsuit would be considered employee misconduct and jeopardize her job, there is no basis for finding equitable estoppel unless the employer phrases the order in a way calculated to mislead a reasonable person."²⁰⁰ Employers are entitled to take measures to prevent employees from spreading "what may be groundless rumors concerning improper conduct by another employee."²⁰¹

Based upon her deposition testimony, the court found the plaintiff's claim that the general manager told her she would be discharged if she disclosed the incident to anyone besides management not credible.²⁰² Judge Posner observed that affidavits offered to contradict a deposition "are so lacking in credibility as to be entitled to zero weight in summary judgment proceedings unless the affiant gives a plausible explanation for the discrepancy."²⁰³ An error by counsel during the deposition is not a sufficiently plausible explanation.²⁰⁴

Moreover, the court noted that even if things had occurred as the plaintiff described, equitable estoppel still would not apply, because such a threat would be grounds for a Title VII retaliation claim.²⁰⁵ Therefore, a reasonable person would be encouraged to bring a claim in this scenario, not deterred.²⁰⁶ Allowing a claim of retaliation to be used to extend the statute of limitations would misapply the equitable estoppel doctrine and circumvent limitations Title VII imposes on retaliation claims.²⁰⁷ In short, the court held that "a threat to retaliate is not a basis for equitable estoppel."²⁰⁸

199. 301 F.3d 621 (7th Cir. 2002).

200. *Id.* at 623.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 624.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

III. AMERICANS WITH DISABILITIES ACT

A. U.S. Supreme Court Developments

The United States Supreme Court's most contentious survey period decision involving the ADA came in *U.S. Airways, Inc. v. Barnett*.²⁰⁹ In *Barnett*, the Court grappled with the potential conflict when a disabled worker seeks assignment to a particular position as a "reasonable accommodation," in conflict with the interests of other workers who have superior rights to bid for the job under a seniority system.²¹⁰ A narrow five-justice majority held that "the seniority system will prevail in the run of cases" because a requested accommodation that conflicts with a seniority system's rules would not ordinarily be "reasonable."²¹¹ To survive summary judgment on the question, a plaintiff would have to show special circumstances that make a seniority rule exception reasonable in that particular case.²¹²

Cargo-handler Barnett injured his back and invoked seniority rights to transfer to a mailroom position. U.S. Airways' seniority system allowed others to periodically bid on that position based on seniority. When Barnett learned that at least two employees with greater seniority intended to bid on the job, he asked to remain in the position as a reasonable accommodation for his disability-related limitations. U.S. Airways turned down his request, and Barnett lost the job.

The district court granted summary judgment in U.S. Airways' favor, but the Ninth Circuit reversed in an *en banc* decision. The Ninth Circuit considered a seniority system merely one factor in the undue hardship analysis. When the case reached the Supreme Court, U.S. Airways argued, and Justices Scalia and Thomas agreed, that the requested accommodation was automatically unreasonable because it would have allowed Barnett to violate a rule that others must obey.²¹³ The Court's majority, however, focused on the definition of the term "reasonable," plus the fact that the plaintiff bears the burden of demonstrating that any given accommodation would be "reasonable."²¹⁴ The Court cited several considerations in support of its conclusion that an exception to a seniority system would not be reasonable in the run of cases.²¹⁵ Such systems, even if not collectively bargained, are important to employee-management relations because they contribute to employee expectations of fair and uniform treatment.²¹⁶ The resulting sense of job security and opportunity for steady, predictable advancement based on objective criteria helps encourage

209. 535 U.S. 391 (2002).

210. *Id.* at 393.

211. *Id.* at 394.

212. *Id.*

213. *Id.* at 397-98.

214. *Id.* at 400-02.

215. *Id.* at 403-06.

216. *Id.* at 404.

employees to stay with the employer.²¹⁷

The Court went on to give examples of situations where an exception to a seniority system might be a reasonable accommodation.²¹⁸ If the employer retains the right to change the seniority system unilaterally and does so fairly frequently, one more exception might not make much difference in employee expectations.²¹⁹ Also, the system itself might contain so many exceptions that one more would have little effect.²²⁰

The Court found it easier to reach consensus in the case of *Chevron U.S.A., Inc. v. Echazabal*.²²¹ This case involved a challenge to an EEOC regulation that allowed employers to refuse to hire an individual if his performance on the job would endanger his own health, due to a disability. All nine justices agreed that the ADA permitted the regulation.

Plaintiff Echazabal, who suffered from Hepatitis C, applied for a job at a Chevron oil refinery. He received an offer contingent on passage of a physical examination, but Chevron's doctors concluded that his condition would be aggravated by continued exposure to toxins at the refinery and the company withdrew the offer of employment.

The Ninth Circuit concluded that the EEOC's regulation creating a threat-to-self defense for employers exceeded the scope of permissible rulemaking under the ADA. The text of the ADA explicitly allows employers not to employ those whose disability would place others in the workplace at risk, but says nothing about threats to the disabled employee herself.²²²

The U.S. Supreme Court again ruled against the Ninth Circuit, thereby resolving a circuit split.²²³ The Court examined the language of the statute and noted, among other things, that an interpretation limited to a threat to others in the workplace could mean that an employer could not refuse to hire a worker whose disability would threaten others outside the workplace.²²⁴ For example, it would make little sense if a typhoid carrier could successfully sue for being denied a job as a meat packer.²²⁵ The Court also noted that the EEOC's interpretation allowing a threat-to-self defense would avoid conflicts with OSHA regulations.²²⁶

A third survey period U.S. Supreme Court decision dealt with the ADA and the ongoing development of the law on what constitutes a disability under the Act. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²²⁷ a unanimous

217. *Id.*

218. *Id.* at 405.

219. *Id.*

220. *Id.*

221. 536 U.S. 73 (2002).

222. *Id.*

223. *Id.* at 78.

224. *Id.* at 83-84.

225. *Id.* at 84.

226. *Id.* at 84-85.

227. 534 U.S. 184 (2002).

Court concluded that the plaintiff's carpal tunnel syndrome did not constitute a disability under the Act.²²⁸

Plaintiff Williams worked with pneumatic tools in an automobile manufacturing plant in Kentucky. Her physician placed her on permanent work restrictions after diagnosing her with carpal tunnel syndrome and tendinitis in both arms. After two years of modified duty jobs and a workers compensation leave, Toyota assigned Williams to a quality control inspection position. This arrangement worked for a while, until Toyota implemented a process change requiring all the quality control inspectors to rotate through all of the tasks in the inspection process. One of those tasks was to wipe cars with oil, which involved working with hands and arms at shoulder height for several hours at a time.

Williams requested the accommodation of working no more than two jobs within the quality control process. When the parties could not come to an agreement, Williams filed an ADA claim arguing that her physical impairment substantially limited her in manual tasks, housework, gardening, playing with her children, lifting, and working.

The Sixth Circuit Court of Appeals focused on the "manual tasks" claim and found that Williams was disabled because her condition "prevented her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time."²²⁹ The Sixth Circuit disregarded evidence that Williams was able to tend to her personal hygiene and perform personal and household chores.²³⁰

In analyzing whether Williams' conditions amounted to a disability, the Supreme Court observed that the dictionary definition of "substantially," as used in the phrase "substantially limits," excludes impairments that interfere with the performance of manual tasks in only a minor way.²³¹ Moreover, the word "major" in the phrase "major life activities" requires that those activities be important -- in fact, of "central importance to daily life."²³² The impact of the impairment must also be permanent or long-term.²³³

The Court noted the special necessity of an individualized assessment of an impairment's effect when the impairment is such that symptoms vary widely among individuals.²³⁴ Carpal tunnel syndrome, the Court noted, is that type of condition.²³⁵ The Court cited studies that one quarter of carpal tunnel cases resolve in a month without surgical treatment, although in twenty-two percent of

228. *Id.* at 187, 202.

229. *Id.* at 192 (quoting 224 F.3d 840, 843 (6th Cir. 2000)).

230. *Id.*

231. *Id.* at 196-97.

232. *Id.* at 197.

233. *Id.* at 198.

234. *Id.* at 199.

235. *Id.*

cases the symptoms linger for as long as eight years or more.²³⁶

The Court also clarified its holding in *Sutton v. United Air Lines, Inc.*,²³⁷ where the Court held that the major life activity of working is substantially limited only if the plaintiff is unable to work on a broad class of jobs.²³⁸ *Sutton* was not intended, the Court said, to suggest that other major life activities besides working were also subject to a class-based analysis.²³⁹

The Court explained that the ADA does not require the analysis of whether an impairment constitutes a disability to focus entirely on the effect of the impairment in the work place.²⁴⁰ It should instead focus on whether the individual has a disabling impairment in the context of carrying out the normal tasks of her daily life, rather than tasks that are unique to any particular job.²⁴¹ In this case, "repetitive work with hands and arms extended at or above shoulder levels for extended periods of time" would not be an important part of daily living for most people.²⁴² The court of appeals therefore erred in disregarding evidence that the respondent was able to maintain her personal hygiene and perform personal and household chores.²⁴³ The evidence showed that she could "brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house."²⁴⁴ Her condition did require her to avoid sweeping, give up dancing, require occasional help dressing, and reduce the frequency with which she played with her children, gardened, and drove long distances.²⁴⁵ However, the Court concluded that these changes "did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual-task disability as a matter of law."²⁴⁶

B. Seventh Circuit Rulings on What Constitutes a Disability

During the survey period, the Seventh Circuit also added to the body of law on what constitutes a disability under the ADA. In *Furnish v. SVI Systems, Inc.*,²⁴⁷ a plaintiff, Furnish, who suffered from cirrhosis caused by chronic Hepatitis B was terminated for unsatisfactory performance.²⁴⁸ His position at

236. *Id.*

237. 527 U.S. 471 (1999).

238. *Toyota Motor Mfg., Inc.*, 534 U.S. at 200.

239. *Id.*

240. *Id.* at 201.

241. *Id.*

242. *Id.* (quoting 224 F.3d 840, 841 (6th Cir. 2000)).

243. *Id.* at 201-02.

244. *Id.* at 202.

245. *Id.*

246. *Id.*

247. 270 F.3d 445 (7th Cir. 2001).

248. *Id.* at 446.

SVI involved video system installation work at hotels.²⁴⁹ His Hepatitis B limited his ability to travel and to keep up with his employer's installation schedule.²⁵⁰

The Seventh Circuit concluded that Furnish's ADA claim failed because the major life activity he cited as the basis for his claim—liver function—does not qualify as a major life activity under the Act.²⁵¹ Although Hepatitis B is both serious and chronic, the court did not deem liver function something "integral to one's daily existence" in the same sense as functions such as eating and working.²⁵² Furnish failed to assert that his condition substantially limited him in working or in any other activity. Moreover, even if liver function served as a major life activity under the ADA, the plaintiff failed to prove that his disease substantially limited his liver function, because doctors' reports characterized his liver function as "adequate" and "normal."²⁵³ In its treated condition, the plaintiff's liver disease became dormant, and because courts examine conditions taking into account corrective or mitigating measures, he could not show any substantial limitation in liver function.

The Seventh Circuit next addressed whether diabetes was a disability under the ADA in *Nawrot v. CPC International*.²⁵⁴ Nawrot's type I diabetes required him to inject himself with insulin three times daily and to test his blood sugar at least ten times daily.²⁵⁵ Even with these measures, he still experienced episodes of both high and low blood sugar that affected his health, personality, and behavior. In the two years leading up to his termination, he had three diabetic episodes at work.²⁵⁶

In February 1997, when introduced to a new employee, Nawrot said "I would shake your hand but I just went to the bathroom and did not wash my hands."²⁵⁷ He later blamed this strange behavior on disorientation due to hypoglycemia. He took a three-month leave of absence to attend to his health but, when he returned, he and his employer could not agree on appropriate accommodations, and Nawrot was eventually fired.²⁵⁸

Nawrot brought suit, arguing that his diabetes substantially limited the major life activities of working, thinking, and caring for himself. The Seventh Circuit agreed that Nawrot's diabetes substantially limited his ability to think and care for himself, and focused on those two major life activities.²⁵⁹

The court then went on to consider Nawrot's condition in light of mitigating

249. *Id.*

250. *Id.* at 447.

251. *Id.* at 449.

252. *Id.* at 449-50.

253. *Id.* at 450-51.

254. 277 F.3d 896 (7th Cir. 2002).

255. *Id.* at 901.

256. *Id.*

257. *Id.*

258. *Id.* at 901-02.

259. *Id.*

measures.²⁶⁰ The court noted that despite his medical regimen, Nawrot could not completely control his blood sugar level.²⁶¹ He would on occasion lose consciousness and fall and experience difficulty expressing coherent thoughts.²⁶² Physically, he had incurred kidney damage and nerve damage in his feet.²⁶³

Although the Seventh Circuit determined that Nawrot was disabled under the ADA definition, his suit failed because he was unable to show that his employer's proffered legitimate, nondiscriminatory reason for discharging him was a pretext for disability discrimination.²⁶⁴ After "numerous documented occasions of inappropriate behavior," Nawrot's employer demanded that he "straighten up and fly right," but "instead he crashed and burned" when he harassed a coworker by contacting her outside of work hours in violation of the employer's explicit directive.²⁶⁵ The court found that the fact that the harassment did not occur at the workplace was of no moment and held for the employer because Nawrot's discharge was unrelated to his disability status.²⁶⁶

The next opinion the Seventh Circuit issued during the survey period addressing what constitutes a disability came in *Stein v. Ashcroft*,²⁶⁷ a case involving myofascial pain syndrome, which is a muscle problem that results in soreness and tenderness from repetitive muscular motion.²⁶⁸ Plaintiff Stein worked for the Immigration and Naturalization Service (INS) in Chicago. She worked mostly at the INS office, but at times she would travel outside the office to perform "outreach" assignments. These excursions required moderate physical activity such as long periods of standing, carrying boxes of files and office supplies, and setting up chairs and folding tables.²⁶⁹

After Stein's diagnosis with myofascial pain syndrome, she was limited in her ability to perform heavy lifting.²⁷⁰ Her supervisor eliminated her "outreach" duties, because it was not feasible to provide an assistant to do the lifting and carrying of boxes, and the INS did not want the risk of further injury to Stein. Stein filed suit under the Rehabilitation Act of 1973,²⁷¹ claiming that the elimination of her outreach duties caused her to lose opportunities for overtime pay, points necessary for promotion, and opportunities to socialize and exchange ideas.²⁷²

Stein argued that she was substantially limited in the major life activity of

260. *Id.* at 904.

261. *Id.* at 905.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 907.

266. *Id.*

267. 284 F.3d 721 (7th Cir. 2002).

268. *Id.* at 723-24.

269. *Id.*

270. *Id.*

271. 29 U.S.C. § 794 (1994).

272. *Stein*, 284 F.3d at 724-25.

working and other major life activities.²⁷³ The Seventh Circuit looked to the ADA for guidance because its definition of disability was carried over nearly verbatim from the Rehabilitation Act. The court rejected Stein's claim that she was substantially limited in the major life activity of working, because lifting and carrying heavy items on outreach assignments was only a single aspect of Stein's duties.²⁷⁴ The inability to perform a single, narrow job for one employer does not establish that one is precluded from working in a broad class of jobs, as is required for protection under the ADA.²⁷⁵

The court went on to consider Stein's other alleged substantial limitations in major life activities.²⁷⁶ She claimed that her condition had caused her "loss of sleep, impaired sexual relations, inability to participate in sports, inability to cut her food and inability to brush her hair."²⁷⁷ The court quickly disposed of these claims, because the only evidence Stein offered was her own affidavit in which she referred to these alleged problems only in the past tense.²⁷⁸ The court also cited the recent decision in *Toyota Motor Manufacturing, Inc. v. Williams*²⁷⁹ for the proposition that a plaintiff claiming an impairment that substantially limits the major life activity of "performing manual tasks" must show that the limitation is long term or permanent and substantial in effect.²⁸⁰

A final survey period Seventh Circuit case involving the perimeters of disability came in *Szmaj v. American Telephone & Telegraph Co.*²⁸¹ Plaintiff Szmaj suffered from congenital nystagmus, which caused him difficulty focusing his eyes and prevented him from holding any job that required more than fifty percent of his time to be spent reading.²⁸² Szmaj, a long time AT&T employee, had applied for a job that required reading a computer screen for eighty percent or more of the work day. The Seventh Circuit affirmed summary judgment for AT&T, stating "we can imagine, though with some difficulty, a society of bookworms in which a person unable to read more than fifty percent of the time would be deemed unable to engage in a major activity of life. That is not our society. To be unable to read all day long is a misfortune for someone who loves to read or who wants to hold a job (a judgeship for example!) that requires continuous reading, but the ability to read all day long is not a major life activity."²⁸³ The court sympathized with the fact that the plaintiff could not read at all without some discomfort, but noted that "discomfort and disability are not

273. *Id.* at 725-26.

274. *Id.* at 726.

275. *Id.* at 725-26.

276. *Id.* at 726.

277. *Id.*

278. *Id.*

279. 534 U.S. 184 (2002).

280. *Stein*, 284 F.3d at 726 (citing *Toyota Motor Mfg., Inc.*, 534 U.S. 184).

281. 291 F.3d 955 (7th Cir. 2002).

282. *Id.* at 956.

283. *Id.*

synonyms.”²⁸⁴

C. *Temporary Light Duty Positions*

One more notable Seventh Circuit ADA case during the survey period involved an employer who set aside a pool of light duty positions for employees who were recovering from various physical difficulties.²⁸⁵ Plaintiff Tamara Watson, an assembly line worker, suffered a shoulder injury that restricted her ability to perform repetitive motions.²⁸⁶ Her employer normally required all assembly line workers to rotate through all positions (in an effort to avoid repetitive stress injuries) but allowed Watson to perform only a limited series of tasks during her recovery. When Watson’s physician imposed a permanent restriction against any tasks that required repetitive motion of her upper right arm, her employment was terminated. She sued on the grounds that the light duty position should have been assigned indefinitely as a reasonable accommodation.²⁸⁷

The Seventh Circuit held that assuming Watson was disabled (which the court deemed doubtful under *Toyota v. Williams*), it would not be reasonable to require her employer to create a new job tailored to Watson’s individual abilities. Here, Watson acknowledged that job rotation was both the normal procedure and a sensible business practice, rather than a scheme to avoid ADA obligations.²⁸⁸ The court considered the practice of creating a pool of light duty positions that keep experienced workers available for reassignment after a recovery period, and concluded that this procedure is exactly what the ADA encourages. Watson sought to turn this practice against the employer by claiming entitlement to occupy such a light duty (or limited task) position indefinitely.²⁸⁹ The Seventh Circuit declined to punish a good deed, holding that a person is “otherwise qualified” within the meaning of the ADA only if he or she can perform a regular position with or without accommodation.²⁹⁰ Watson could not do so and, instead, wanted the employer to create a different job by carving out a subset of the various assembly line tasks.²⁹¹ The court affirmed summary judgment for the employer, holding that “the ADA does not require employers to create new positions.”²⁹²

284. *Id.*

285. *Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2002).

286. *Id.* at 750.

287. *Id.* at 750-51.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

IV. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Disparate Impact*

The debate continues on whether disparate impact claims are viable under the Age Discrimination in Employment Act (ADEA). In March 2002, the U.S. Supreme Court heard oral arguments in *Adams v. Florida Power Corp.*²⁹³ That case was brought by 117 employees who were displaced during a series of reorganizations and workforce reductions. The plaintiffs were among the seventy percent of affected Florida Power workers who were over forty years of age.²⁹⁴ These employees claimed that their employer's action had a disparate impact on workers over forty, because a seemingly neutral policy fell more harshly on that group and, they argued, there was no valid business reason for the disparity.²⁹⁵ The district court initially allowed the case to proceed as a class action, but later reversed its position and held that the ADEA required proof of intentional discrimination. The Eleventh Circuit Court of Appeals agreed.²⁹⁶

During oral arguments, Justice Ruth Bader Ginsberg pointed out that the core definition of discrimination in the ADEA exactly tracks Title VII language, yet Florida Power was asking that those identical words be interpreted differently.²⁹⁷ Justice Sandra Day O'Connor, however, observed that the disparate impact test might be more appropriate for race discrimination than for age discrimination because of a long societal history of racial bias.²⁹⁸

Court watchers awaiting resolution of the issue were disappointed when, on April Fool's Day, the Supreme Court backed away from the issue by dismissing its writ of certiorari as improvidently granted.²⁹⁹ Some commentators viewed this as a victory for older workers generally, although a defeat for these particular plaintiffs, because it appeared that the court conservatives would probably have had the votes to affirm the Eleventh Circuit ruling, had certiorari not been dismissed.³⁰⁰

The Seventh Circuit has taken a position similar to that of the Eleventh Circuit. In *Miller v. City of Indianapolis*,³⁰¹ the court declined to decide whether disparate impact claims could be prosecuted under the Uniform Services Employment and Reemployment Rights Act³⁰² (USERRA), because the case

293. Linda Greenhouse, *Supreme Court Hears Arguments on Major Issues in Age Bias Law*, N.Y. TIMES, Mar. 21, 2002, at A33.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. 535 U.S. 228 (2002).

300. Gina Holland, *Court Will Not Rule in Age Case*, ASSOCIATED PRESS, Apr. 1, 2002.

301. 281 F.3d 648 (7th Cir. 2002).

302. 38 U.S.C. § 4301 (1994 & Supp. V. 1999).

failed on the facts.³⁰³ The court took the opportunity to reiterate that, "[a]t some future time it may become necessary for us to decide whether a disparate impact claim can be prosecuted under USERRA. We do not always allow such claims. For instance, we do not recognize disparate impact claims in this circuit under the Age Discrimination in Employment Act."³⁰⁴

B. Pretext and Independently Sufficient Reasons

In *Lesch v. Crown Cork & Seal Co.*,³⁰⁵ a sixty-one-year-old comptroller with nearly forty years of service was forced into early retirement during a corporate reorganization, and a fifty-year-old was appointed head of the new accounting group.³⁰⁶ The Seventh Circuit bypassed an analysis of Lesch's prima facie case, stating, "It is not always necessary to march through this entire process if a single issue proves to be dispositive. Here, as is often true, that issue is pretext or the lack thereof."³⁰⁷

Crown offered several justifications for its decision to discharge Lesch. The principal reason was that the comptroller position was eliminated during a phase-out of a Crown division.³⁰⁸ The executive in charge of deciding who would head up the new accounting group believed the younger candidate the most obvious choice because he was most familiar with certain accounting projects, had been doing a satisfactory job for her, and was competent as an accountant to lead the group. Also, the successful candidate had a superior understanding of computers and proficiency with accounting software.³⁰⁹

On appeal, Lesch challenged some of these reasons for the retention decision, but the court noted that "he has said nothing about others. This alone dooms his effort to establish pretext. Where an employer offers multiple independently sufficient justifications for an adverse employment action, the plaintiff-employee must cast doubt on each of them"³¹⁰ The Court therefore affirmed summary judgment for the defendant.³¹¹

C. No State Immunity Against EEOC Suits

In *EEOC v. Board of Regents*,³¹² the EEOC brought a public enforcement action on behalf of four former employees of the University of Wisconsin Press who claimed they were terminated on the basis of their age. The University of Wisconsin argued on appeal that the suit should have been barred under Eleventh

303. *Miller*, 281 F.3d at 651.

304. *Id.*

305. 282 F.3d 467 (7th Cir. 2002).

306. *Id.* at 469.

307. *Id.* at 472-73.

308. *Id.*

309. *Id.* at 474.

310. *Id.* at 473.

311. *Id.* at 474.

312. 288 F.3d 296 (7th Cir. 2002).

Amendment concepts of sovereign immunity.³¹³

The Seventh Circuit noted that, “[i]f this case was to be prosecuted in federal court, the EEOC had to do it. The individual charging parties were barred by the Eleventh Amendment from suing the state.”³¹⁴ The court went on to note, however, that it is well established that just because states retain sovereign immunity for private lawsuits does not mean that they have similar immunity from suit by the federal government.³¹⁵ In *Alden v. Maine*,³¹⁶ the U.S. Supreme Court held that even though private suits against states were barred under the ADA, ADA standards could be enforced “by the United States in actions for money damages.”³¹⁷

The University of Wisconsin argued that the nature of this case made it different because the EEOC was not seeking to remedy a pattern of intentional discrimination, but was rather “simply standing in the shoes of the [four] individuals and acting in privity with them as their representative. In other words, it is just a private suit dressed in fancy clothes.”³¹⁸ The court was unpersuaded, noting that “[w]hatever wind might originally have been in the sails of this argument has been knocked out by *EEOC v. Waffle House, Inc.*”³¹⁹ In *Waffle House*, the U.S. Supreme Court upheld the EEOC’s right to bring an enforcement action under the ADA on behalf of a former employee who signed a valid binding arbitration agreement.³²⁰ The Seventh Circuit acknowledged the University of Wisconsin’s argument that sovereign immunity was different and more important than the Federal Arbitration Act or arbitration agreements, but concluded that “[i]f ultimately *Waffle House* is to be distinguished from a case such as this one, that distinction should be drawn not by us, but rather by the Supreme Court.”³²¹ The court therefore affirmed a jury verdict in favor of the EEOC.³²²

The court also addressed the University’s argument that the EEOC had not established a *prima facie* case because it did not show that the charging parties were replaced with persons at least ten years younger.³²³ The EEOC argued that *prima facie* case analysis was no longer relevant at that stage of the proceedings.

The Court noted authority on both sides of this issue, but went on to “look briefly” at the University’s argument.³²⁴ The University cited *O’Connor v. Consolidated Coin Caterers Corp.*, where the U.S. Supreme Court stated that a

313. *Id.* at 299.

314. *Id.*

315. *Id.*

316. 527 U.S. 706 (1999).

317. *Id.* (citing *Board of Trustees v. Garrett*, 531 U.S. 356 (2001)).

318. *Bd. of Regents*, 288 F.3d. at 299-300.

319. *Id.* at 300.

320. *Id.*

321. *Bd. of Regents*, 288 F.3d at 300 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)).

322. *Id.* at 305.

323. *Id.* at 302.

324. *Id.*

prima facie case of age discrimination required replacement of the claimant with someone "substantially younger."³²⁵ The Seventh Circuit has defined "substantially younger" as a ten-year differential.³²⁶ The court has also held, however, that the ten-year line is not indelible.³²⁷

The court, therefore, looked at other evidence offered.³²⁸ Aside from the fact that the four oldest employees were the only ones terminated, other facts supported an inference that the choice was based on age.³²⁹ For example, justifications for the layoff proposal were developed only after the termination decisions had been made.³³⁰ The two decision makers acknowledged during cross examination that they were seeking a "new vision" for the Press, that bringing younger individuals into the Press was part of that vision, and that the ADEA was viewed as a "legal hurdle" to hiring replacements who would fit that new vision.³³¹ One decision maker expressed the opinion that the Press had not "had the vision to be agile enough" and that by terminating the charging parties, the Press would "improve that agility."³³²

The court concluded that the jury could reasonably have inferred that in this decision maker's mind, youth and agility were linked.³³³ After reviewing the evidence, the Seventh Circuit concluded that the jury verdict for the EEOC was supported by the evidence, despite the fact that some of the charging parties' replacements were less than ten years younger.³³⁴

V. FAMILY AND MEDICAL LEAVE ACT

A. *Advance Designation of Leave Not Required*

In a 5-4 decision, the U.S. Supreme Court struck down a Labor Department regulation requiring employers to inform employees in advance that leave would be designated as Family and Medical Leave Act (FMLA) leave in order for that leave to count toward FMLA entitlement. In *Ragsdale v. Wolverine World Wide, Inc.*,³³⁵ plaintiff Ragsdale was diagnosed with Hodgkin's disease in 1996.³³⁶ She became unable to work and exhausted the seven months of unpaid sick leave she was allowed under the company's policy. During this time, the company held her position open and maintained her health benefits. When Ragsdale sought an

325. *Id.*

326. *Id.* (citing *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672 (7th Cir. 1997)).

327. *Id.* (citing *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997)).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 303.

332. *Id.*

333. *Id.*

334. *Id.* at 299, 301, 304.

335. 535 U.S. 81 (2002).

336. *Id.* at 84-85.

additional thirty days of leave after missing thirty consecutive weeks of work, the company advised her that she had exhausted her available leave. Ragsdale contended that she was still entitled to twelve weeks of leave under the FMLA because she had never received specific notice that any part of her absence would count as FMLA leave.³³⁷

Labor Department regulations require employers to inform their workers about the FMLA and how it relates to the company's leave plan.³³⁸ Employers must give written notice that leave has been designated as FMLA leave within a reasonable time after the employee provides notice of the need for leave under the regulations, with a reasonable time defined as "one or two business days if feasible."³³⁹

The majority of the Court held that the categorical penalty of denying an employer any credit for leave granted prior to notice of the designation of the leave was contrary to the remedial design of the FMLA.³⁴⁰ The penalty lacked any connection to whatever prejudice the employee might have suffered.³⁴¹ In Ragsdale's case, she had not shown that she would have taken less time off, or taken time on an intermittent basis, had she received timely notice.³⁴²

The government argued that a categorical penalty was easier to administer than a fact-specific inquiry, but the Court was unpersuaded, pointing out that the FMLA requires a retrospective, case-by-case analysis.³⁴³ The Court also noted that the Labor Department regulation could have a backlash effect because employers seeking to avoid the problem that Wolverine experienced might simply discontinue voluntary programs providing leave in addition to the FMLA's minimum requirement.³⁴⁴ They would then simply designate all leave as FMLA leave, and employees would end up worse off.³⁴⁵

B. Calling in Sick Is Insufficient FMLA Notice

In *Collins v. NTN-Bower Corp.*,³⁴⁶ the plaintiff had accumulated twelve informal and four formal warnings for attendance problems before she called in sick for two days and was discharged. Collins argued that in situations where advance notice by the employee of the need for leave is impossible, the employee is never required to advise the employer that the leave request falls within the FMLA.³⁴⁷

337. *Id.*

338. *Id.* at 86-87.

339. *Id.* at 87 (quoting 29 C.F.R. § 825.301(c))

340. *Id.* at 88.

341. *Id.*

342. *Id.* at 90.

343. *Id.* at 91.

344. *Id.* at 94-96.

345. *Id.*

346. 272 F.3d 1006 (7th Cir. 2001).

347. *Id.* at 1008.

The Seventh Circuit disagreed, holding that in such situations notice may be delayed, but it is not entirely excused.³⁴⁸ In other words, "notice is essential even for emergencies," although it may occur after the fact.³⁴⁹ The court repeated its previous position that the ADA protects only persons who are capable of working full time over the long run, and noted that courts have been similarly "reluctant to read the FMLA as allowing unscheduled and unpredictable, but cumulatively substantial, absences."³⁵⁰

Collins' argument suffered from two flaws. First, she notified her employer simply that she was "sick," which does not imply any serious health condition.³⁵¹ Second, her deposition testimony that she was incapacitated by depression between ten percent and twenty percent of the time placed her squarely on the horns of a dilemma. Had she truly been incapacitated to that extent, in an unpredictable manner, she would not have qualified for protection under either the ADA or the FMLA. Her actual attendance record showed, however, that she had not missed even ten percent of scheduled work days prior to her discharge, which tended to show that her depression was not as severe as this testimony would indicate.³⁵² Moreover, the Court noted that "depression did not come on [Collins] overnight."³⁵³ When Collins became aware of her condition, she could have given her employer timely notice of her need for time off to allow the employer to evaluate whether she qualified for FMLA leave.³⁵⁴

C. "No Call No Show" Policy Upheld in FMLA Context

In *Lewis v. Holsum of Ft. Wayne, Inc.*,³⁵⁵ an asthma sufferer who worked at a bakery was put under medical restrictions to avoid flour dust.³⁵⁶ On December 17, 1997, she suffered an asthma attack at work and checked into a medical center for four days. Her husband delivered an "off work slip," dated December 18, 1997, which stated that Lewis was currently hospitalized but did not state when Lewis would return to work. Lewis did not work as scheduled on December 19, 1997, and the company counted that time as FMLA leave.³⁵⁷

Lewis took scheduled vacation time from December 21, 1997, through December 28, 1997. Her next three scheduled work days were December 29, December 31, and January 2, 1998. Lewis did not report to work on any of those days, nor did she call to explain her absence.³⁵⁸ On January 2, 1998, Holsum

348. *Id.*

349. *Id.*

350. *Id.* at 1007.

351. *Id.* at 1008.

352. *Id.* at 1007-08.

353. *Id.* at 1008.

354. *Id.*

355. 278 F.3d 706 (7th Cir. 2002).

356. *Id.* at 708.

357. *Id.*

358. *Id.*

terminated Lewis' employment in accordance with its company rule, contained in a collective bargaining agreement that supported discharge for a three consecutive days of no call, no show.³⁵⁹

Lewis eventually obtained an off work slip verifying her need for time off from December 17, 1997, through January 8, 1998. Her husband delivered the slip to the company on January 2, 1998. This was insufficient under the company policy, however, which required a call in advance of the absence.³⁶⁰

The court repeated its prior holding that the FMLA does not "authorize employees on leave to keep their employers in the dark about when they will return."³⁶¹ Lewis admitted that she had access to a telephone during her absence, and also that her husband, who also worked at Holsum, could have notified the company of his wife's reason for absence. The company was therefore within its rights to enforce its policy of discharge for a three day no call, no show.³⁶²

VI. WORKER'S COMPENSATION

A. Determination of Independent Contractor Status

In 2001, the Indiana Supreme Court established two different tests for evaluating employment status. In *GKN Co. v. Magness*,³⁶³ the court adopted a seven-factor test for determining whether an individual was an employee of two different employers. The court listed the following factors: "(1) right to discharge; (2) mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries."³⁶⁴ The court stated further that "the right to control the manner and means by which the work is to be accomplished is the single most important factor in determining the existence of an employer-employee relationship."³⁶⁵

Later in the year, the court addressed the question of employee versus independent contractor status in *Moberly v. Day*.³⁶⁶ The ten factors Indiana courts will consider are as follows:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation with reference to whether in the locality the work is usually done under the direction of the employer or by a specialist without

359. *Id.* at 709.

360. *Id.* at 710.

361. *Id.* (citing *Gilliam v. UPS, Inc.*, 233 F.3d 969, 971 (7th Cir. 2000)).

362. *Id.*

363. 744 N.E.2d 397 (Ind. 2001).

364. *Id.* at 402 (citing *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991)).

365. *Id.* at 403.

366. 757 N.E.2d 1007 (Ind. 2001).

supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for person doing the work; (f) the length of time for which the person is employed; (g) the method of payment whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.³⁶⁷

In *Expressway Dodge, Inc. v. McFarland*,³⁶⁸ the Indiana Court of Appeals had occasion to decide which (if either) of these tests to use in determining whether an individual was an independent contractor for purposes of the worker's compensation statute. McFarland was a retiree who drove vehicles to and from auctions and other sites for an automobile dealership. He was free to accept or reject assignments, but when he did accept he typically began and ended his day at the dealership and wore clothing bearing the Expressway logo. Expressway neither designated routes nor directed the speed and manner of McFarland's driving. Mileage reimbursement was based on the most direct route, and Expressway provided insurance, dealer plates, gasoline, meals, and occasionally lodging. On December 15, 1998, when McFarland was seriously injured in a one-car accident while driving to an auction on Expressway's behalf, the question arose whether McFarland was an employee subject to the Worker's Compensation provisions, or an independent contractor.³⁶⁹

The court of appeals held that the ten-factor restatement test followed in *Moberly v. Day* was most appropriate in the worker's compensation context and, in a 2-1 opinion, proceeded to apply the ten factors.³⁷⁰ The majority determined that Expressway did not control the work details. However, this was not dispositive because the type of work did not require significant supervision, especially given McFarland's experience.³⁷¹ Although the work was intermittent, it had been going on for years, McFarland had no particular skill or separate business. The work was part of the dealership's regular business and the company provided all instrumentalities needed. McFarland was paid by the job without tax withholdings, although the parties had treated the arrangement as an employment relationship. The majority concluded, all things considered, that McFarland was acting as an employee when he was injured.³⁷²

Judge Friedlander dissented, agreeing generally with the discussion of applicable law but disagreeing over the conclusion to be drawn from applying the ten-factor test.³⁷³ He identified control as the single most important factor based

367. *Id.* at 1110 (quoting RESTATEMENT (SECOND) OF AGENCY, § 220(2) (1958)).

368. 766 N.E.2d 26 (Ind. Ct. App. 2002).

369. *Id.* at 28.

370. *Id.* at 30.

371. *Id.*

372. *Id.* at 32.

373. *Id.* at 33.

on *GKN Co. v. Magness*, and noted that McFarland was always free to decline any trip without adverse consequences. If he chose to accept, his instructions were limited to destination and did not cover manner of driving, route, or even departure time. Because of this “largely unfettered discretion,” in Judge Friedlander’s view McFarland was not an employee of Expressway.³⁷⁴

This case is helpful because it identifies the relevant factors for consideration in distinguishing between employees and independent contractors for purposes of Indiana worker’s compensation. It is also instructive by illustrating the judgment involved when applying those factors. The panel evaluated a fairly complete set of facts, with one judge arriving at a conclusion exactly opposite that reached by the other two. Indiana employers will welcome the clarification as to what test will apply, but must keep in mind that, because the analysis is extremely fact specific, the conclusion will often be difficult to predict.

B. Coverage During Arrivals and Departures

During the survey period, the Indiana Court of Appeals dealt with two cases involving worker’s compensation coverage for employees arriving at or departing from the employer’s premises. In *Milledge v. The Oaks*,³⁷⁵ a decision subsequently vacated when the Indiana Supreme Court granted transfer,³⁷⁶ a diabetic housekeeper at a living center twisted her ankle in the parking lot as she arrived for her shift. The injury gradually grew worse until she developed gangrene that required the amputation of her leg below the knee. The Worker’s Compensation Board found as fact that the asphalt surface of the parking lot was clean, dry, level, and free of debris, and denied coverage on the basis that Milledge’s injury did not arise out of and in the course of her employment because there was no causal connection between the sprained ankle and her work duties.³⁷⁷

On appeal, the focus was whether the injury occurred “in the course of” and also “arose out of” employment, because both elements must be present for the injury to be compensable.³⁷⁸ The court agreed that an injury “arises out of” employment when a causal nexus exists between the injury and the duties or services that the injured employee performed.³⁷⁹ The court also noted that risks are incidental to employment if they are not risks to which the public at large is subjected.³⁸⁰

In this case, the evidence showed that the clear, level, and dry parking lot did

374. *Id.*

375. 764 N.E.2d 230 (Ind. Ct. App. 2002). This decision has since been overruled by Indiana Supreme Court, 784 N.E.2d 926 (Ind. 2003).

376. 774 N.E.2d 518 (2002).

377. *Milledge*, 764 N.E.2d at 232-33.

378. *Id.* at 234.

379. *Id.*

380. *Id.* at 235 (citing *Smith v. Bob Evans Farms, Inc.*, 754 N.E.2d 18, 25 (Ind. Ct. App. 2001)).

not pose any risk to Milledge or, indeed, to anyone else.³⁸¹ Although the injury arose in the course of Milledge's employment, nothing about the work premises or the nature of her work caused or contributed to the injury, so the injury did not "arise out of" employment.³⁸² The Indiana Court of Appeals held that the Worker's Compensation Board did not err when it denied Milledge's application for benefits.³⁸³

Seven months later, the court of appeals addressed an injury that occurred during an employee's departure. In *Price v. R&A Sales*,³⁸⁴ a controversy arose when an employee was injured while leaving the building right after he had been terminated. Price had reported to work the morning of August 17, 1998, and within ten minutes his supervisor advised him of his immediate discharge. He left the office and started to walk down a flight of steps to leave the premises, but slipped and fell backwards, allegedly sustaining injuries. R&A argued that the injuries still fell under the worker's compensation statute, despite Price's discharge prior to the injury. The company successfully filed a motion to dismiss in the trial court.³⁸⁵

The Indiana Court of Appeals looked for guidance to the U.S. Supreme Court in *Bountiful Brick Co. v. Giles* where the U.S. Supreme Court said, "[e]mployment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done."³⁸⁶ The court of appeals also looked to its 1994 decision in *Burke v. Wilfong*,³⁸⁷ where it deemed worker's compensation was the exclusive remedy of an employee who was injured on the employer's property ten minutes before his shift was scheduled to begin.³⁸⁸ The court also observed that several other jurisdictions have held that discharge does not altogether dissolve an employer-employee relationship for worker's compensation purposes if the employee is injured within a reasonable time after termination while leaving the premises.³⁸⁹

The court of appeals concluded that, for purposes of worker's compensation, the employment relationship does not immediately terminate when the discharge takes effect. Here, Price's injuries "clearly arose out of and in the course of his employment with R&A."³⁹⁰ Worker's compensation was his exclusive remedy.³⁹¹

381. *Id.* at 236.

382. *Id.*

383. *Id.*

384. 773 N.E.2d 873 (Ind. Ct. App. 2002).

385. *Id.* at 784.

386. *Id.* at 876 (quoting *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158 (1928)).

387. 638 N.E.2d 865, 868-69 (Ind. Ct. App. 1994).

388. *Price*, 773 N.E.2d at 875-76.

389. *Id.* at 876.

390. *Id.* at 877.

391. *Id.*

C. Frampton Claims by Union Workers

An additional notable survey period worker's compensation decision is *Goetzke v. Ferro Corp.*³⁹² Goetzke, an employee who sustained a back injury, was discharged for allegedly defrauding the company regarding the nature and extent of his injuries. The key issue that the Seventh Circuit addressed was the company's claim that former employees who were covered by collective bargaining agreements when they were discharged could not assert "Frampton claims" alleging retaliatory discharge for exercise of workers compensation rights.³⁹³ The Seventh Circuit had previously held that Frampton claims were unavailable to such workers, but the Indiana Court of Appeals had subsequently held otherwise.³⁹⁴ Because the Indiana Supreme Court had not addressed the question, the court of appeals decision was authoritative absent compelling reason for doubt, thus the Seventh Circuit reversed its position.³⁹⁵

The Seventh Circuit went on to assess the merits of Goetzke's claim that his discharge was retaliatory. The company presented evidence that within three months after back surgery, while Goetzke was still on medical leave, he was videotaped engaging a variety of activities including carrying and loading groceries into his vehicle.³⁹⁶ The day before he participated in a functional capacity evaluation ("FCE"), he was caught on tape working on his car, which involved leaning under the hood and pressing the hood down with both hands to close it.³⁹⁷ The tape also showed him stretching across the front seat of a truck with his feet dangling awkwardly out of the vehicle.³⁹⁸ Moreover, the person who performed the FCE believed that Goetzke "did magnify his symptoms and his ability may be greater than what the data on the test indicates."³⁹⁹

Although Goetzke presented various evidence in rebuttal that he was indeed severely injured, the court focused on the fairly substantial time period between Goetzke's worker's compensation claim and his termination a year later.⁴⁰⁰ The court acknowledged that the company had evidence that Goetzke was malingering, and noted that although company officials may have been negligent by not reading the entire FCE report, or in relying only on the portions they considered unequivocal, "Indiana law does not render a company liable for retaliatory discharge because it used poor judgment."⁴⁰¹ The court concluded that Goetzke could bring a Frampton claim even though he was covered under a

392. 280 F.3d 766 (7th Cir. 2002).

393. *Id.* at 772-73.

394. *Id.* at 773 (citing *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511, 517 (7th Cir. 1985); *Bentz Metal Prod. Co. v. Stephans*, 657 N.E.2d 1245 (Ind. Ct. App. 1995)).

395. *Id.*

396. *Id.* at 770.

397. *Id.*

398. *Id.* at 770-71.

399. *Id.*

400. *Id.* at 775.

401. *Id.* at 776.

collective bargaining agreement, but that his claim failed because he did not show that the company's asserted reason for his discharge, i.e., fraud, was pretextual.⁴⁰² In arriving at this conclusion, the court looked to Title VII case law where "the question is not whether [the evaluation was] *right* but whether the employer's description . . . is *honest*."⁴⁰³

VII. OTHER STATE LAW DEVELOPMENTS

A. *Amount of Payments Under the Wage Payment Statute*

The most significant employment law decision by the Indiana Supreme Court during the survey period was an interpretation of Indiana's Wage Payment Statute, which provides treble damages as the penalty for failure to pay amounts due on a timely basis.⁴⁰⁴ Dr. Robert Steele had an employment agreement with the Hospital. In the third year of that agreement, the Hospital became concerned that certain payments under the agreement ran afoul of proposed regulations issued by the Federal Healthcare Financing Administration. When the Hospital began withholding these amounts, Steele filed suit alleging breach of contract. The Hospital responded that the Wage Payment Statute, on which Steele's claim was based, governed only the frequency and not the amount that employers must pay employees. Because the Hospital had paid at the appropriate intervals, it argued that it could not be liable for the treble damages.⁴⁰⁵

The court looked to the language of the statute, which provides that an employer "shall pay each employee at least semi-monthly or bi-weekly, if requested, the *amount due* the employee."⁴⁰⁶ The statute goes on to say, "payment shall be made for *all wages* earned to a date not more than ten (10) days prior to the date of payment."⁴⁰⁷ The court took the view that the phrases "all wages" and "amount due" established, by their plain, ordinary and usual meaning, that the legislature intended this statute to govern both frequency and amount of payment.⁴⁰⁸

The court went on to note that this interpretation avoided an absurd result. If the statute governed only frequency of payment, employers could easily avoid liability by paying a nominal amount such as one dollar either bi-weekly or semi-monthly, without regard to the true amount owed.⁴⁰⁹ The court also noted that the Wage Payment Statute was the appropriate vehicle for Steele's claim, because it covers current employees and those who have voluntarily left employment

402. *Id.* at 776-77.

403. *Id.* (quoting *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992)).

404. *St. Vincent Hospital & HealthCare Center, Inc. v. Steele*, 766 N.E.2d 699 (Ind. 2002).

405. *Id.* at 701.

406. *Id.* at 702 (citing IND. CODE § 22-2-5-1(a) (1998) (emphasis added)).

407. *Id.* (emphasis added).

408. *Id.* at 703-04.

409. *Id.* at 704.

temporarily or permanently.⁴¹⁰ The Wage Claim Statute, which the Hospital invoked and which requires that claims be submitted to the Indiana Department of Labor as a prerequisite to filing a complaint in court, applies to employees who have been separated from work by their employer and those whose work has been suspended as the result of an industrial dispute.⁴¹¹

The court did leave one question unanswered. The Hospital had argued at the court of appeals that it should not be subject to treble damages because it had a good faith basis for withholding the amount of wages at issue.⁴¹² The court of appeals rejected the notion of any good faith exception to the Wage Payment Statute. Upon transfer, the Hospital did not challenge the court of appeals' decision on that point, and the Indiana Supreme Court specifically expressed no opinion on that issue.⁴¹³

B. Interviewing Adverse Former Employees

The day after the Indiana Supreme Court decision in *Steele*, the Indiana Court of Appeals handed down a notable decision in *P.T. Barnum's Night Club v. Duhamell*.⁴¹⁴ In this case, a bachelorette party guest suffered injury when a male entertainer fell while trying to lift her. In the ensuing litigation, her attorney sought to interview a former employee who had been acting as general manager of the club on the night of the accident. The attorney asked the former employee whether he was represented by the club's counsel. The employee said he was not and eventually signed an affidavit, which the club later moved to strike.⁴¹⁵

The club looked to Indiana Rule of Professional Conduct 4.2, which states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."⁴¹⁶ The court of appeals considered the American Bar Association's position on this rule as applied to former employees, and went on to survey various other jurisdictions' approaches.⁴¹⁷ After discussing these various points of view, the court joined the majority of jurisdictions in holding that Rule 4.2 does not prohibit an attorney from contacting a former employee of an adverse party.⁴¹⁸

The court did acknowledge the risks that such contacts create, particularly the possibility that such *ex parte* interviews could result in disclosure of

410. *Id.* at 705 (citing IND. CODE § 22-2-5-1(b)).

411. *Id.* (citing IND. CODE § 22-2-9-2(a) (b)).

412. *Id.* at 702 n.2.

413. *Id.*

414. 766 N.E.2d 729 (Ind. Ct. App. 2002).

415. *Id.* at 731.

416. *Id.* at 732.

417. *Id.* at 733-36.

418. *Id.* at 737.

information covered by an attorney-client privilege.⁴¹⁹ It invited the Indiana Supreme Court to use its rulemaking authority to consider the question, but held that "Rule 4.2 contains no limitations on the contacts an attorney may make with the former employee of an adverse party."⁴²⁰

Within a month, this holding was being applied in federal court.⁴²¹ The EEOC filed a motion for leave to conduct an *ex parte* interview with one of Dana Corporation's former employees in a racial harassment suit.⁴²² The district court noted that the question of who may be contacted under Rule 4.2 is frequently litigated and reviewed both Seventh Circuit district court case law and the recent court of appeals determination.⁴²³ Dana Corporation argued that because the former employee had managerial responsibilities, *ex parte* contacts should be barred. The court noted that Dana did not, however, contend that any information the employee might provide would be either imputed to Dana or binding upon Dana.⁴²⁴ Moreover, Dana did not argue that the *ex parte* communication could result in disclosure of confidential, classified, or privileged information.⁴²⁵

The court concluded that absent any specific reason for prohibiting *ex parte* contact with the former employee, particularly privileged communication, the EEOC's motion for leave to interview should be granted.⁴²⁶

C. *Wrongful Termination and Refusal to Incur Personal Liability*

In August 2002, the court of appeals took on the timely topic of corporate officer responsibility. In *McGarrity v. Berlin Metals, Inc.*,⁴²⁷ the plaintiff was hired as CFO of a corporation and, he claimed, soon discovered that his new employer was falsifying its property tax returns to understate tax liability.⁴²⁸ McGarrity refused to go along, and the company owner responded by outsourcing preparation of the returns and refusing to provide McGarrity with a copy. McGarrity obtained the information from the local taxing authority, calculated the tax liability as understated by at least \$66,000, and lost his job shortly thereafter.⁴²⁹

The Indiana Court of Appeals reviewed some common law exceptions to

419. *Id.*

420. *Id.*

421. EEOC v. Dana Corp., 202 F. Supp. 2d 827 (N.D. Ind. 2002).

422. *Id.* at 828.

423. *Id.* at 829-30.

424. *Id.* at 830 (citing *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996) and *Brown v. St. Joseph County*, 184 F.R.D. 246 (N.D. Ind. 1993) for the proposition that "former employees cannot bind the corporation").

425. *Id.*

426. *Id.*

427. 774 N.E.2d 71 (Ind. Ct. App. 2002).

428. *Id.* at 74.

429. *Id.* at 75.

Indiana's baseline employment-at-will rule.⁴³⁰ The relevant exception in this case was that an employee who claims that he or she was discharged for refusing to commit an unlawful act that would result in personal liability may sue for wrongful discharge.⁴³¹ McGarrity could have committed a Class C felony by certifying the company's financial statements as accurate to company lenders if he knew that the tax liability was significantly understated.⁴³² He could also have been liable for tax evasion and conspiracy.⁴³³

The court distinguished McGarrity's situation from that of an employee who refuses an order to violate public policy without incurring personal liability.⁴³⁴ It had previously held in *Campbell v. Eli Lilly & Company* that no employment-at-will exception covers those situations.⁴³⁵ Here, however, the court of appeals sent the wrongful termination claim back for jury trial.⁴³⁶

The court also reconsidered a jury verdict in favor of the employer on McGarrity's breach of contract claim.⁴³⁷ This claim was based on assurances the employer allegedly provided when recruiting McGarrity that company employees left only of their own accord.⁴³⁸ McGarrity and his wife testified that they both told the company owner that they were interested in the relocation and job change only if the new employment would be permanent, and were assured that it would be.⁴³⁹ Indiana also recognizes an exception to the employment-at-will doctrine if the employer knows the employee had a former job with assured permanency and accepted a new position only upon receiving assurances that the new employer would guarantee similar permanency.⁴⁴⁰ Then, the employee may be fired only for good cause.⁴⁴¹

The trial court instructed the jury that the company could not terminate McGarrity, assuming he proved a promise of permanent employment, as long as McGarrity was "performing the job as he was sought out to do. There must [have been] some good reason to have him fired apart from whim."⁴⁴² The court of appeals agreed with McGarrity that this instruction did not define the term "good cause" with sufficient particularity, and sent the question back for retrial.⁴⁴³

430. *Id.* at 76-77.

431. *Id.* at 76.

432. *Id.* at 78.

433. *Id.* at 77-78.

434. *Id.* at 78.

435. *Id.* (citing 413 N.E.2d 1054 (Ind. Ct. App. 1980)).

436. *Id.* at 79.

437. *Id.* at 75, 80.

438. *Id.* at 79.

439. *Id.* at 77-78.

440. *Id.* at 81.

441. *Id.*

442. *Id.* at 82.

443. *Id.*

VIII. OTHER NOTABLE CASES

In *Muick v. Glenayre Electronics*,⁴⁴⁴ the Seventh Circuit provided employers some reassurance against claims of invasion of privacy. Muick was employed by Glenayre at the time he was arrested on charges of receiving and possessing child pornography. Federal law enforcement authorities asked Glenayre for a laptop computer it furnished Muick for use at work.⁴⁴⁵ Glenayre retrieved the computer from Muick's work area, but refused to hand it over to the federal authorities until they produced a warrant, because it contained confidential corporate information.

The Seventh Circuit gave short shrift to Muick's claim that Glenayre had invaded his privacy.⁴⁴⁶ Judge Posner acknowledged that there could in some circumstances be a right of privacy in employer-owned equipment furnished to an employee for use in the place of employment.⁴⁴⁷ For example, Judge Posner said, an employer might equip an employee's office with a safe or file cabinet or other receptacle in which to keep his private papers, so that the employee could reasonably assume that the contents of the safe were private.⁴⁴⁸ Here, however, Glenayre had announced that it could inspect the laptops furnished for employees, which destroyed any reasonable expectation of privacy.⁴⁴⁹ The bottom line for Judge Posner was that "the laptops were Glenayre's property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions"⁴⁵⁰

CONCLUSION: THE WATCH LIST

The United States Supreme Court continues to show a high level of interest in employment law and has accepted five cases for review during the 2003-2004 term. These cases involve issues ranging from the burden of proof in a "mixed motive" case to the substantive elements of a claim under the ADEA. The Court's rulings on these and other issues could further alter the legal landscape for practitioners in this evolving area of the law.

The issues before the U.S. Supreme Court in its upcoming term include:

Does the ADEA prohibit "reverse age discrimination"?⁴⁵¹

Dennis Cline brought a claim under the ADEA on behalf of himself and other similarly situated employees after his employer, General Dynamics Corporation, and the labor union, the United Auto Workers, entered into a new collective bargaining agreement that eliminated certain retirement benefits for workers

444. 280 F.3d 741 (7th Cir. 2002).

445. *Id.* at 742.

446. *Id.* at 743.

447. *Id.*

448. *Id.* (citations omitted).

449. *Id.*

450. *Id.*

451. *Cline v. General Dynamics Land Systems*, 296 F.3d 466 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 1786 (2003).

under 50 years old.⁴⁵² Cline argued that provision of benefits solely to those over the age of 50 constituted illegal discrimination based on age.⁴⁵³ Creating a circuit split, the Sixth Circuit ruled that the ADEA creates a cause of action for so-called “reverse age discrimination”⁴⁵⁴—invalidating policies that favor older workers over their younger (but also over 40) counterparts.⁴⁵⁵ If upheld, the decision could render illegal early retirement programs and other seniority-based programs that advantage older employees.⁴⁵⁶

Can a defendant remove a FLSA claim to federal court?⁴⁵⁷

Breuer sued in state court claiming unpaid wages and other damages under the FLSA and his employer removed the lawsuit to federal court pursuant to 28 U.S.C. 1441 and 1446.⁴⁵⁸ Breuer moved to remand the case, arguing that the FLSA falls within an exception to the removal statute⁴⁵⁹ because the act provides that a FLSA action “may be maintained” in state court.⁴⁶⁰ The Eleventh Circuit rejected this argument and held that removal was proper.⁴⁶¹ In doing so, however, the Eleventh Circuit noted the discord in the federal courts over this issue. The Eleventh Circuit actively encouraged the Supreme Court to grant review over its decision, commenting that, “it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard.”⁴⁶²

What is the proper standard of review for a denial of benefits under an ERISA plan when the Plan Administrator also serves as the funding source?⁴⁶³

Kenneth Nord sued the Black & Decker disability plan, claiming that a denial of disability benefits violated ERISA.⁴⁶⁴ Although the Plan granted absolute discretion to the Plan Administrator to resolve claims for benefits, Black & Decker served as both the Plan Administrator and the funding source for the Plan.⁴⁶⁵ The Ninth Circuit ruled that this dual role created an apparent “conflict

452. *Id.* at 467-68.

453. *Id.* at 468.

454. The Sixth Circuit expressly rejected the label “reverse discrimination,” but acknowledged that it was a “commonly held belief” that the term could describe the theory presented in the case. *Id.* at 471.

455. *Id.* at 469-70.

456. *See id.* at 466 (Williams, J., dissenting).

457. *Breuer v. Jim’s Concrete of Brevard*, 292 F.3d 1308 (11th Cir.), *cert. granted*, 123 S. Ct. 816 (2003).

458. *Id.* at 1308.

459. 28 U.S.C. 1441(a) allows removal “except as otherwise expressly provided by Act of Congress.”

460. *Id.* at 1308.

461. *Id.* at 1309.

462. *Id.* at 1310.

463. *Nord v. Black & Decker Disability Plan*, 296 F.3d 823 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 817 (2003).

464. *Id.* at 827.

465. *Id.* at 828.

of interest.” The court further concluded that the apparent conflict, coupled other evidence of inconsistencies and irregularities in the administration of the claim, invalidated the Plan language granting discretion to the Plan Administrator and mandated application of a “de novo” standard of review.⁴⁶⁶ Applying this new standard, the Ninth Circuit reversed the entry of summary judgment for the Plan Administrator and directed the entry of summary judgment for the employee.⁴⁶⁷ As this decision illustrates, the standard of review in a denial of benefits case can be outcome-determinative. If upheld, the Ninth Circuit’s ruling could make it significantly easier for claimants to prevail in certain types of benefits litigation.

Does the decision not to rehire a recovered addict who previously quit in lieu of discharge violate the ADA?⁴⁶⁸

Hernandez, a former employee of Hughes Missile Systems (Raytheon),⁴⁶⁹ tested positive for cocaine use and then resigned his employment “in lieu of discharge.”⁴⁷⁰ Later, after successfully completing a rehabilitation program, Hernandez applied for reemployment.⁴⁷¹ Raytheon rejected his application pursuant to a company policy that employees who quit in lieu of discharge are not available for rehire.⁴⁷² The Ninth Circuit ruled that this policy effectively discriminated against employees regarded as disabled or with a record of disability (recovered addicts).⁴⁷³ The Supreme Court’s ruling in this case could shed light on the issue of whether neutral policies may be invalidated because they have unintended consequences that, if intended, could violate the ADA.

When is it proper to give a “mixed motive” instruction in an employment discrimination case?⁴⁷⁴

In the third Ninth Circuit decision to be accepted for review next term, the Ninth Circuit ruled that it would not distinguish between “direct evidence” and “indirect evidence” for purposes of deciding whether it was proper for the district court to give a “mixed motive” instruction in a discrimination case.⁴⁷⁵ The Ninth Circuit’s survey of decisions from other jurisdictions on this point revealed extensive disagreement and confusion on this subject, which the court described as “a quagmire that defies characterization.”⁴⁷⁶ The Ninth Circuit ultimately ruled, in a divided en banc decision, that “Congress did not impose a special or

466. *Id.* at 830-31.

467. *Id.* at 832.

468. *Hernandez v. Hughes Missile Sys.*, 292 F. 3d 1038 (11th Cir. 2002), *cert. granted sub nom.* *Raytheon Co. v. Hernandez*, 123 S.Ct. 1255 (2003).

469. Subsequent to the events that gave rise to the litigation, Hughes was acquired by Raytheon Company. *Id.* at 1038 n.1.

470. *Id.* at 1040.

471. *Id.*

472. *Id.*

473. *Id.* at 1044.

474. *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 816 (2003).

475. *Id.* at 850.

476. *Id.*

heightened evidentiary burden on the plaintiff in a Title VII case in which discriminatory animus may have constituted one of two or more reasons for the employer's challenged actions."⁴⁷⁷ The Ninth Circuit opined that the approach was "consistent with recent Supreme Court cases underscoring that no special pleading or proof hurdles may be imposed on Title VII plaintiffs."⁴⁷⁸ It is yet to be seen, however, whether the Supreme Court will agree with the Ninth Circuit's analysis.

477. *Id.*

478. *Id.*

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA*

Although the Indiana Rules of Evidence (Rules) went into effect more than nine years ago, many aspects of those rules remain open to interpretation. Debate over the proper rule of evidence in a particular situation stems not only from interpreting the text of the Rules, but also from determining the proper influence of statutory and common law.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2001, and September 30, 2002. The discussion topics are grouped in the same subject order as the Rules.

I. SCOPE OF THE RULES

A. *In General*

According to Rule 101(a), the Rules apply to all Indiana court proceedings except where “otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court.”¹ In situations where the rules do not “cover a specific evidence issue, common or statutory law shall apply.”² This leaves the applicability of the Rules open to debate.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the Rules, has been interpreted by the Indiana Supreme Court to mean that the Rules trump any conflicting statute.³

B. *All Forms of Conveying Information Fall Under Rule 106*

In *Desjardins v. State*,⁴ Desjardins appealed a decision in which the Indiana Court of Appeals upheld the trial court’s exclusion of portions of a videotape. The trial court had allowed portions of the tape to be shown, but refused to permit Desjardins to show the entire tape to the jury. Desjardins argued this was error under the doctrine of completeness. The court of appeals looked at Rule 106, which provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.”⁵ The court of appeals then held that a videotape is not a writing or recording under Rule 106

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1. IND. R. EVID. 101(a)

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997); *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996).

4. 759 N.E.2d 1036 (Ind. 2001).

5. *Id.* at 1036-37 (quoting IND. R. EVID. 106).

because a videotape is not included in the list of writings and recording set forth in Rule 1001(1), and the definition of photograph, contained at 1001(2), included motion pictures.⁶

The Indiana Supreme Court granted transfer "to make clear that all modes of conveying information, including videotapes, constitute writings or recordings for purposes of Rule 106, even if they are defined by Rule 1001 as 'photographs.'"⁷ However, under the facts being considered in *Desjardines*, the appellant failed to show the relevance of the absent portions of the videotape, and the court upheld the alternative holding of the court of appeals.⁸

II. RELEVANCE AND PROBATIVE VERSUS PREJUDICIAL

A. Admission of Bite Mark Evidence

In *Carter v. State*,⁹ Carter appealed his convictions for murder, burglary, criminal confinement and battery. Carter argued that bite mark evidence used at his trial should have been excluded because the probative value of the bite mark evidence was outweighed by the danger of unfair prejudicial effect under Rule 403. Carter contended that the bite mark was simply evidence that he was present at the scene of the crime, but not evidence that he had participated in the beating or murder of the victim, and that the jury had based its finding of guilt on the bite mark evidence alone.¹⁰

The court stated that "all relevant evidence is 'inherently prejudicial' in a criminal prosecution, so the inquiry boils down to a balance of probative value against the likely unfair prejudicial impact the evidence may have on the jury,"¹¹ and that in determining likely unfair prejudicial impact, "courts will look for the dangers that the jury will substantially overestimate the value of evidence or that the evidence will arouse or inflame the passions or sympathies of the jury."¹² The court found the risk that the jury overly relied on the bite mark evidence to be minuscule, and that the evidence of the bite mark was highly probative to rebut Carter's contention that he was merely present, not a participant.¹³ The court also stated that these matters (the Rule 403 balancing test) are within the sound discretion of the trial court.¹⁴

6. *Desjardines v. State*, 751 N.E.2d 323, 326 (Ind. Ct. App.), *aff'd in part, vacated in part* by 759 N.E.2d 1036 (Ind. 2001).

7. *Desjardines*, 759 N.E.2d at 1037.

8. *Id.*

9. 766 N.E.2d 377 (Ind. 2002).

10. *See id.* at 381-82.

11. *Id.* at 382 (quoting *Richmond v. State*, 685 N.E.2d 54, 55-56 (Ind. 1997)).

12. *Id.* (quoting *Evans v. State*, 643 N.E.2d 877, 880 (Ind. 1994)).

13. *See id.* at 381.

14. *See id.* at 382.

B. Admission of Photographic Evidence

In *Corbett v. State*,¹⁵ Corbett challenged the admissibility of twenty-six autopsy photographs introduced at trial. The court reiterated the rule that “[r]elevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice.”¹⁶

In order to conduct its analysis, the court looked to existing case law, finding that “[a]utopsy photos often present a unique problem because the pathologist has manipulated the corpse in some way during the autopsy. Autopsy photographs are generally inadmissible if they show the body in an altered condition.”¹⁷ However, the court also noted that “there are some situations where some alteration of the body is necessary to demonstrate the testimony being given.”¹⁸

Eleven of the photos showed the body before the autopsy and two additional photos showed the body after the head wounds had been cleaned and some hair shaved. These photos were found to have been properly admitted, due to the rule that photographs depicting a victim in a natural state after death are admissible.¹⁹

Other autopsy photos depicting the body in various stages of examination were found to be admissible where the pathologist was able to testify as to how the photos, with portion of skull and brain removed, showed actions he took to determine the extent and nature of the injuries. This was also true of a photo showing a portion of skull against the edge of a table, demonstrating how a hard surface could produce the fracture.²⁰

The remaining photos were found to have been erroneously admitted. Photos which should not have been admitted included photos focusing on the hollow shell of the victim’s body. The court held that these photos “greatly and unnecessarily enhance[d] the gruesomeness of the pictures” and “although relevant to the cause of death and the disputed issue of the number of blows, were so prejudicial that the trial court abused its discretion in allowing them to be admitted.”²¹

Also excluded were other photos focusing on the ribs and hollow shell of the victim, as they had slight probative value (the broken ribs were not in issue), and their prejudicial effect was high due to the gruesome nature of the photos. The court also found in error admission of additional photos of the victim’s brain removed from the skull. Although these photos also showed the extent and nature of the injuries, they were cumulative and their prejudicial effect

15. 764 N.E.2d 622 (Ind. 2002).

16. *Id.* at 627 (citing IND. R. EVID. 403; *Byers v. State*, 709 N.E.2d 1024, 1028 (Ind. 1999)). This essentially means that photographs simply need to pass the test of Rule 403.

17. *Id.* (citing *Allen v. State*, 686 N.E.2d 760, 776 (Ind. 1997), *cert. denied*, 525 U.S. 1073 (1999)).

18. *Id.* (quoting *Swingley v. State*, 739 N.E.2d 132, 133-34 (Ind. 2000)).

19. *Id.* (citing *Loy v. State*, 436 N.E.2d 1125, 1128 (Ind. 1982)).

20. *See id.* at 627-28.

21. *Id.* at 627.

outweighed their probative value.²² However, the court determined that the erroneous admission of these photographs had not impacted the defendant's substantial rights, and thus the error was harmless.²³

In *Price v. State*,²⁴ Price challenged the admission of two photos of himself found at the crime scene. The photos showed Price at a club with four other persons, gesturing in a manner that could be considered a gang sign. While the State admitted that identity and presence at the crime scene were not in issue, it argued that the "photographs were relevant 'to show the guilty knowledge of the defendant' by demonstrating that he had changed his hairstyle and had gold caps removed from his teeth."²⁵

The court said that "[a] defendant does not open the door to otherwise inadmissible character evidence merely by dressing and grooming in a manner appropriate for court,"²⁶ and that "[p]hotographs showing how a defendant looked at the time of the crime are frequently probative. Here, however, they largely invited jurors to evaluate guilt based on whether the defendant looked like the type of person who would commit this sort of crime. This is what Rule 404(a) prohibits."²⁷ The court did find the admission of the photographs to be error, but it was considered to be harmless error.²⁸

C. Admission of Hair Comparison Evidence

In *Wentz v. State*,²⁹ Wentz objected to the admission of hair comparison evidence by the State's witness. Wentz contended that since the State's witness could not say with certainty that the hair in evidence matched Wentz's, her testimony was so unreliable and speculative that it was prejudicial to allow its introduction, and that its prejudicial effect substantially outweighed its probative value.³⁰

The court restated the existing rule, established in *McGrew v. State*,³¹ that "trial courts are generally within their discretion to permit hair comparison analysis."³² Because Wentz offered nothing to distinguish this testimony from that in *McGrew*, and the testimony was that the hair was consistent with and not necessarily a conclusive match for Wentz's hair, the proper remedy was "cross-

22. *Id.* at 627-28.

23. *See id.* at 628; *see also* *Dunlap v. State*, 761 N.E.2d 837, 841-42 (Ind. 2002).

24. 765 N.E.2d 1245 (Ind. 2002).

25. *Id.* at 1248 (quoting *Record* at 5539-40).

26. *Id.* at 1248-49.

27. *Id.* at 1249.

28. *See id.* at 1249.

29. 766 N.E.2d 351 (Ind. 2002).

30. *Id.* at 358. The State's witness had testified that the hair was "sufficiently similar to be of possible common origin." *Id.*

31. 682 N.E.2d 1289 (Ind. 1997).

32. *Wentz*, 766 N.E.2d at 358 (citing *McGrew*, 682 N.E.2d at 1292).

examination, not exclusion.”³³ Therefore it was not abuse of discretion to admit the evidence under Rule 403.³⁴

D. Similar Gun Evidence

In *Dunlap v. State*,³⁵ the evidence used to convict Dunlap of murder had included showing and demonstrating a 7.62 assault rifle at trial, despite the fact that no weapon had been discovered relating to the victim’s wounds. The State had offered the rifle as a demonstrative exhibit during testimony from an expert tool marks and firearms examiner.³⁶ Dunlap objected on the basis of Rule 403, claiming any probative value of the similar weapon would be outweighed by its prejudicial effect.³⁷

Because no murder weapon had been found, and the defendant claimed the shooting was an accident, the court found that the trial court had been within its discretion in allowing the State to utilize the similar weapon to demonstrate how such a weapon works in order to examine whether use of such a weapon was likely to have been accidental. The court also noted as significant the fact that the trial court had admonished the jury that “[t]here was no weapon found in this case. The weapon that may be displayed is a demonstrative exhibit that is going to be used by the State to demonstrate or show you what a similar type weapon could or should look like.”³⁸

E. Improper Admission of Character Evidence

In *Wertz v. State*,³⁹ Wertz claimed that the trial court had improperly allowed evidence concerning prior bad acts in violation of Rule 404(b).⁴⁰ Wertz had filed a motion in limine, requesting that evidence of prior bad acts be excluded at trial, and that motion had been granted by the trial court. However, at trial, the State had offered testimony concerning prior drug transactions involving Wertz.⁴¹

Although Wertz requested a continuing objection to this evidence, the trial court allowed the testimony and questions, ruling that the questions did not go to Wertz’ character, but rather to help establish motive, intent, identity and/or mistake. The court agreed with Wertz’ assertions that even if some evidence of

33. *Id.*

34. *Id.* Wentz also raised Rule 702 issues regarding expert testimony, but the court determined these issues had not been raised by objection at trial and were therefore waived. *Id.*

35. 761 N.E.2d 837 (Ind. 2002).

36. *Id.* at 842.

37. *Id.*

38. *Id.* (quoting Record at 416).

39. 771 N.E.2d 677 (Ind. Ct. App. 2002).

40. Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” IND. R. EVID. 404(b).

41. *Wertz*, 771 N.E.2d at 683-84.

this type was admissible, the continual and repetitive focus on it, at some point, begins to prove character rather than plan or motive. Although it agreed that the trial court had erred in continuously overruling these objections, the court of appeals found the error to be harmless and affirmed the conviction.⁴²

In *Rhodes v. State*,⁴³ Rhodes appealed from a judgment finding him guilty of operating a vehicle while intoxicated and of operating a vehicle when his privileges were suspended as a habitual traffic offender. Rhodes contended that improper evidence had been introduced, in violation of Rule 404(b), concerning prior acts on his part.⁴⁴

During the State's case in chief, the prosecution had introduced evidence that the arresting officer approached the defendant because he knew him to be a habitual traffic offender. The court held this evidence to be proper as it explained why the officer had investigated Rhodes after seeing him operate a vehicle. However, the prosecution also introduced evidence of the officer's "other run ins with Mr. Rhodes,"⁴⁵ testimony from the officer indicating that Rhodes had a history of public drinking, and Rhodes' entire negative driving history without redactions.

The State had also introduced evidence that there had been a domestic dispute between Rhodes and one of his witnesses, presented evidence that the witness was pregnant, and questioned the legitimacy of that witness' child.⁴⁶ The State also questioned Rhodes about his prior habitual traffic offender arrest, prior arrests, and probation, and questioned the credibility of Rhodes' witness.⁴⁷

The court pointed out that Rhodes had failed to object to much of this character evidence at trial, and this would normally result in waiver of the issue. However, this waiver does not apply if "the admission of evidence constitutes fundamental error."⁴⁸ The court stated that the test for this error is that "[i]n order to qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible."⁴⁹

In this case, the court held that "the introduction of improper character evidence was so blatant and so pervasive that it rendered a fair trial impossible."⁵⁰ The court supported this finding by restating that "[i]n its effort to prove guilt, the State may not 'flood the courtroom' with unnecessary and prejudicial details of prior criminal conduct merely because some of that evidence is relevant and admissible."⁵¹ Under the facts of *Rhodes*, the court held that "the prosecution did not just flood the courtroom with unnecessary and

42. *Id.* at 684.

43. 771 N.E.2d 1246 (Ind. Ct. App. 2002).

44. *See id.* at 1251.

45. *Id.* at 1252 (quoting Record at 91).

46. *See id.* at 1252-54.

47. *See id.* at 1254-56.

48. *Id.* at 1256 (citing *Sauerheber v. State*, 698 N.E.2d 796, 804 (Ind. 1998)).

49. *Id.* (citing *Sauerheber*, 698 N.E.2d at 804).

50. *Id.*

51. *Id.* (quoting *Thompson v. State*, 690 N.E.2d 224, 236 (Ind. 1997)).

prejudicial details of prior criminal conduct; its case in chief seemed to be a focused inquiry into Rhodes's and Ralston's prior misconduct" and "the introduction of improper character evidence constituted fundamental error."⁵²

In *Greenboam v. State*,⁵³ Greenboam appealed his convictions for child molestation, arguing that evidence of his prior guilty pleas for molesting his stepdaughter and daughter (who was also the current victim) should have been excluded under Rule 404(b). At trial, the evidence of the prior guilty pleas was admitted with an admonishment to the jury that the evidence was to be used only for demonstrating a common plan or scheme.⁵⁴

In considering whether this admission was proper, the appellate court stated that

[o]ur adoption of Federal Rule of Evidence 404(b) in *Lannan v. State* (1992), Ind., 600 N.E.2d 1334, and our subsequent promulgation of Indiana Rule of Evidence 404(b), do not represent a mere continuation of that common law caselaw. Instead of the old "common scheme or plan" rule, our law now admits evidence of "plan" alone. It is a narrower exception than our old rule, which tended to degenerate into an all-purpose excuse for admitting pretty much any old prior misconduct.⁵⁵

The court found that the State had offered no evidence to support the contention that Greenboam's previous bad acts were in any way part of a plan to molest his daughter regarding the charged crimes. The two incidents of molestation were not part of an uninterrupted transaction, and the prior bad acts could not be described as part of a plan to commit the crimes currently charged. The court of appeals found that because the prior bad acts could only serve to establish Greenboam's propensity to commit child molestation, the trial court had abused its discretion by admitting the evidence of those prior acts.⁵⁶

F. Evidence of Contemporaneous Crimes Not Charged

In *Bocko v. State*,⁵⁷ Bocko appealed his convictions for possession of cocaine, possession of marijuana, and reckless possession of paraphernalia, in part based on his assertion that the trial court improperly allowed introduction of evidence that he also possessed heroin, but was not charged with possession of

52. *Id.*

53. 766 N.E.2d 1247 (Ind. Ct. App. 2002).

54. *See id.* at 1249-54.

55. *Id.* at 1253-54 (quoting *Lay v. State*, 659 N.E.2d 1005, 1015 (Ind. 1995) (Shepard, C.J., dissenting)).

56. *See id.* at 1255; *see also* *Turney v. State*, 759 N.E.2d 671, 679-80 (Ind. Ct. App. 2001) (holding that allegations of conversations of a sexual nature with and requesting nude photos of other underage persons did not demonstrate a plan on the part of the defendant to perform oral sex on the victim).

57. 769 N.E.2d 658 (Ind. Ct. App. 2002).

heroin.⁵⁸

Bocko argued that the heroin evidence was not relevant to the crimes charged and therefore should have been excluded under Rule 402 (which states that evidence that is not relevant is not admissible).⁵⁹ The court referenced Rule 401 for its proposition that "[e]vidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence,"⁶⁰ and then quoted *Minnick v. State*,⁶¹ for its proposition that "[e]vidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted."⁶² Because the heroin evidence completed the story of Bocko's crime, the trial court was within its discretion to admit the evidence.⁶³

Bocko then argued that even if the evidence was relevant, it should have been excluded under rule 404(b) because part of the 404(b) test of admissibility requires that an analysis under Rule 403 be performed, balancing the probative value with the prejudicial effect.⁶⁴ The court found that any error was harmless under the guideline set forth in *Cook v. State*,⁶⁵ which states that "improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood the questioned evidence contributed to the conviction."⁶⁶ The court found sufficient evidence of Bocko's guilt of the other charged crimes to find the present error, if any, harmless.⁶⁷

The fact that the uncharged conduct in *Bocko* was contemporaneous was certainly a significant point. A recent example of a trial court allowing introduction of non-contemporaneous, non-charged bad acts led to a different result. In *Bald v. State*,⁶⁸ Bald appealed his convictions for arson and felony murder. The evidence introduced against Bald at trial included an assertion that he had threatened that the victims "would burn" prior to the occurrence of the

58. *See id.* at 664-65. As a footnote, the court explained that the State did not receive the test results on the third substance until shortly before trial and was not allowed to add the new count for possession of heroin. *See id.* at 665 n.4.

59. *Id.* at 664 (citing IND. R. EVID. 402).

60. *Id.* (quoting IND. R. EVID. 401).

61. 544 N.E.2d 471 (Ind. 1989).

62. *Bocko*, 769 N.E.2d at 664-65 (citing *Minnick*, 544 N.E.2d at 480).

63. *Id.* at 665.

64. *Id.* (citing IND. R. EVID. 403, 404(b)).

65. 734 N.E.2d 563 (Ind. 2000).

66. *Bocko*, 769 N.E.2d at 665 (citing *Cook*, 734 N.E.2d at 569).

67. *Id.* The court did, however, overturn the conviction for reckless possession of paraphernalia on other grounds. *Id.* at 664; *see also* Scalissi v. State, 759 N.E.2d 618, 623 (Ind. 2001) (allowing evidence of uncharged rape which occurred immediately prior to the charged murder and holding that the proximity in time made the alleged rape probative as to the defendant's motive, intent, or absence of mistake).

68. 766 N.E.2d 1170 (Ind. 2002).

fatal fire, as well as evidence of an unrelated incident in which he had threatened an unidentified man and then later returned with a gun.⁶⁹

The State argued that this evidence of the earlier, unrelated altercation was evidence of motive. The court, however, agreed with Bald that this evidence had been used to show Bald's propensity to carry out his threats, thus proving character. Because this type of evidence is precluded by Rule 404(b), the court found that this evidence should have been excluded.⁷⁰ However, the court found the error to be harmless and declined to reverse the convictions.⁷¹

Another variation on this theme can be found in *Wilson v. State*,⁷² where Wilson appealed his conviction for murder. Wilson argued that the introduction of evidence that he carried on prostitution and drug dealing businesses at the same time as his trial for murder violated Rule 404(b)'s prohibition against evidence of other crimes or acts to prove guilt as well as Rule 403's prohibition on evidence having more prejudicial effect than probative value.⁷³

The court found that Rule 404(b) was not violated because this evidence was necessary for the jury to understand the relationships between the victim, defendant and witnesses. In addition, the trial court had admonished the jury as to the evidence's allowed usage and evidence also existed that the defendant had admitted that he "'had to take her [the victim] out of it' to protect his business."⁷⁴ The court also found no violation of Rule 403 because the trial court had carefully documented its recognition and evaluation of the Rule 403 issues involved in the introduction of the evidence.⁷⁵

In *Craun v. State*,⁷⁶ Craun argued that his conviction for child molestation should be reversed because the trial court had allowed evidence of prior bad acts in violation of Rule 404(b). Craun had been accused of molesting three girls, and although the accusations of the second and third girls were severed from the trial at issue, those girls were allowed to testify regarding their allegations against Craun on the basis that Craun had opened the door by claiming contrary intent.⁷⁷

The court of appeals agreed with Craun that he had never claimed a contrary intent, but had insisted that he had never committed the relevant acts. Significantly, the court said that the testimony of the other two girls "'if relevant at all, shows a propensity for [child molesting], which is precisely what is prohibited by the Rules of Evidence,'"⁷⁸ and that even if Craun's motive was properly at issue, the court was "at a loss to determine how his alleged touching of [the other two girls] is relative to his motive for touching [the girl in

69. *Id.* at 1173.

70. *Id.* (quoting IND. R. EVID. 404(b)).

71. *Id.*

72. 765 N.E.2d 1265 (Ind. 2002).

73. *See id.* at 1270.

74. *Id.*

75. *See id.* at 1271.

76. 762 N.E.2d 230 (Ind. Ct. App. 2002).

77. *See id.* at 232-35.

78. *Id.* at 237-38 (quoting *Ortiz v. State*, 741 N.E.2d 1203, 1208 (Ind. 2001)).

question].”⁷⁹ Because the probative value of the additional testimony from the other two girls was found to be substantially outweighed by the danger of unfair prejudice, the court of appeals found that the trial court had abused its discretion and remanded for a new trial.⁸⁰

G. Introduction of Police Interview With Repeated Accusations of Guilt

In *Bostick v. State*,⁸¹ Bostick argued that the introduction of a police interview, in which the jury was allowed to “hear [the defendant’s] interrogators ‘repeatedly assert their beliefs and opinions that there was absolutely no doubt that [the defendant] had set the fire that killed her children,’ ”⁸² was a violation of Rule 403 because the probative value was substantially outweighed by the danger of unfair prejudice.⁸³

Although the interrogators claimed multiple times to know of her guilt during the questioning, Bostick never admitted guilt and maintained that she did not remember committing the crimes.⁸⁴ The court determined that the repeated accusations and defendant’s responses had little probative value, but also found they did not create a risk of unfair prejudice.⁸⁵ In determining that the trial court had not abused its discretion in allowing the admission of interrogation evidence, the court cited *Dunlap* for its proposition that “[t]he evaluation of whether the probative value of a particular item of evidence is substantially outweighed by the danger of unfair prejudice is a discretionary task best performed by the trial court.”⁸⁶

H. Use of Aliases and Mug Shots

In *Hyppolite v. State*,⁸⁷ Hyppolite argued that the trial court had improperly allowed evidence of use of alias identities as well as a mug shot in violation of Rule 404(b). At trial, the State introduced a driver’s license with Hyppolite’s photo, but bearing another name. Because Hyppolite denied committing the crime, the court found that the license was highly probative of identity as the police officer had used the photo to identify Hyppolite as the suspect.⁸⁸

The State also questioned Hyppolite regarding five other aliases. Because Hyppolite spoke with an accent at trial, but the voice on audiotape evidence

79. *Id.* at 237 (citing *Sloan v. State*, 654 N.E.2d 797, 802 (Ind. Ct. App. 1995)).

80. *See id.* at 238-40.

81. 773 N.E.2d 266 (Ind. 2002).

82. *Id.* at 269 (quoting Brief of Defendant-Appellant at 34).

83. *Id.*

84. *Id.* at 270-71.

85. *Id.* at 1271.

86. *Id.* (citing *Dunlap v. State*, 761 N.E.2d 837, 842 (Ind. 2002)). *But See* *Mote v. State*, 775 N.E.2d 687 (Ind. Ct. App. 2002) (finding introduction of redacted videotape containing multiple references to prior criminal history to be abuse of discretion).

87. 774 N.E.2d 584 (Ind. Ct. App. 2002).

88. *See id.* at 592.

submitted by the State did not betray an accent, the court found the fact that Hyppolite used aliases to support the State's contention that Hyppolite may use different accents according to the identity or alias currently in use. Therefore, the "use of an alias was not so far removed from the time of the alleged crime as to be irrelevant to this case."⁸⁹

Hyppolite further challenged the use of a mug shot at trial because mug shots may imply that the individual has been previously arrested. However, the court stated that "mug shots are not per se inadmissible. They are admissible if (1) they are not unduly prejudicial and (2) they have substantial independent probative value."⁹⁰ Because the photo in this case was a head-on Polaroid picture with handwritten notations, and not a standard booking mug shot, the court felt that there was nothing unduly prejudicial about the photo. It also noted that the photo was highly probative in that it showed Hyppolite's photo and his real name, and was therefore a tool in resolving the identity of the individual charged with the crime. The court of appeals found that the trial court had not erred in admitting the evidence.⁹¹

I. Evidence of Behavior While Giving Statement to Police

In *Pierce v. State*,⁹² Pierce filed a motion in limine to exclude evidence that Pierce had masturbated while giving statements to police. The motion was denied by the trial court, which stated that the evidence "does have some tendency to impact upon the jury's consideration of his intent in entering that residence, the fact that in a discussion of the incident, he was engaged in a sexual act"⁹³

The court of appeals agreed with Pierce's contention that this testimony violated Rules 403 and 404(b). It stated that

Frazier's testimony fails both prongs of the [404(b)] test. First, it does not fall under an exception to Rule 404(b). Unlike the State's claim, evidence that Pierce masturbated during his confession does not establish that he intended to rape the victim when he broke into her home. There appears to be no reason to admit this evidence other than to establish that Pierce has a propensity for bizarre behavior.⁹⁴

The court also agreed with Pierce that this evidence was substantially more prejudicial than probative and the trial court had abused its discretion in allowing the testimony.⁹⁵

89. *Id.* at 593.

90. *Id.* (citing *Boatright v. State*, 759 N.E.2d 1038, 1042 (Ind. 2001)).

91. *See id.* at 593.

92. 761 N.E.2d 826 (Ind. 2002).

93. *Id.* at 829.

94. *Id.*

95. *Id.*

J. Notice Provision of 404(b)

In *Burgett v. State*,⁹⁶ Burgett claimed that prior bad act evidence was improperly admitted by the trial court because the State had not complied with the notice provision of Rule 404(b).⁹⁷ The notice provision of Rule 404(b) provides that such prior bad act evidence is not admissible to show action in conformity therewith, but that such bad act evidence may be admissible in some circumstances, "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown."⁹⁸

At trial, the State had waited until the day of trial to file notice of its intent to use prior bad act evidence against Burgett. The court noted that "[t]he purpose of the notice provision, under Ind. R. Evid. 404(b), is to reduce surprise and promote the early resolution of questions of admissibility."⁹⁹ The court noted that the defense was aware of the prior bad acts and the likelihood that the State would attempt to use them, and that there had recently been an election and change of personnel in the Prosecutor's office. The court of appeals held that the trial court had not committed error in allowing the use of the prior bad act evidence.¹⁰⁰

K. Evidence of Transferred Intent to Prove Motive

In *Pickens v. State*,¹⁰¹ Pickens argued that evidence that he had robbed and shot another man two weeks before he shot the victim should have been excluded as evidence of a prior bad act. Pickens argued that this evidence merely showed he was capable of shooting someone else. The court found that the evidence of the earlier incident was relevant to show intent to shoot the victim because there was evidence that the victim had been wearing the coat of the man shot earlier when he was attacked by Pickens.¹⁰² The court found that

[t]he evidence of Pickens's dispute with [the earlier victim] was relevant to show Pickens's motive to shoot [the earlier victim]. The fact that Pickens mistakenly shot [the later victim] instead of [the earlier victim] does not eliminate the motive for the shooting. Thus, the evidence was relevant to a matter at issue other than Pickens's propensity to commit the murder.¹⁰³

96. 758 N.E.2d 571 (Ind. Ct. App. 2001).

97. *See id.* at 579.

98. IND. R. EVID. 404(b).

99. *Burgett*, 758 N.E.2d at 579 (citing *Dixon v. State*, 712 N.E.2d 1086, 1090 (Ind. Ct. App. 1999)).

100. *Id.*

101. 764 N.E.2d 295 (Ind. Ct. App. 2002).

102. *See id.* at 298.

103. *Id.* (citing *Swanson v. State*, 666 N.E.2d 397, 398 (Ind. 1996)).

L. Evidence of Access to the Same Type of Weapon Used in the Crime

Pickens also challenged the admission of statements from police officers stating that they had seen an assault rifle in Pickens' home two years before the charged crime occurred. Pickens argued that this evidence was inadmissible under Rule 404(b) as evidence of a prior bad act.¹⁰⁴

In considering this argument, the court first noted that "it is by no means clear that weapons possession, evidence of gun sales, and the like, are necessarily prior 'bad acts' for 404(b) purposes."¹⁰⁵ Assuming for argument that such evidence could be considered evidence of prior bad acts, the court reiterated that "[e]vidence that a defendant had access to a weapon of the type used in a crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act."¹⁰⁶

The court also considered Pickens' contention that the length of time between the officers' observation and the charged offense made the probative value of the evidence low in relation to its prejudicial effect. The court held that the observation had high probative value on the issue of Pickens' access to the type of weapon used, and that the trial court had not abused its discretion in admitting the evidence.¹⁰⁷

M. Use of the Rape Shield Statute as a Shield and a Sword

In *Turney v. State*,¹⁰⁸ previously mentioned for its Rule 404(b) implications, the victim had accused Turney of molesting her. Turney argued that he should have been allowed to introduce evidence that the victim had molested the younger children of her foster parents. The State invoked Rule 412(a) to prevent testimony on this subject.¹⁰⁹ Rule 412, the "rape shield" rule, provides:

[I]n a prosecution for a sex crime, evidence of the past sexual conduct of the victim or witness may not be admitted, except: (1) evidence of the victim's or pf a witness's past sexual conduct with the defendant; (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded; (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or (4) evidence of conviction for a crime to impeach under Rule 609.¹¹⁰

The presence of evidence that sexual contact did occur, and the State's introduction of evidence of the victim's physical or psychological condition to prove that sexual conduct occurred implied that the defendant was the

104. *See id.* at 299.

105. *Id.* (quoting *Williams v. State*, 690 N.E.2d 162, 174 (Ind. 1997)).

106. *Id.* (quoting *Thompson v. State*, 728 N.E.2d 155, 160 (Ind. 2000)).

107. *See id.* at 300.

108. 759 N.E.2d 671. *See supra* note 56.

109. *See Turney*, 759 N.E.2d at 675-76.

110. IND. R. EVID. 412(a).

perpetrator. The court found that allowing the State to make this inference of guilt, while preventing the defendant from offering an alternate explanation for that condition, was improper.¹¹¹

The court held that

the State cannot use the Rape Shield Statute both as a shield and as a sword. It is error to apply a rule "mechanistically to prohibit the defense from either offering its version of the facts or assuring through cross-examination that the trier of fact has a satisfactory basis for evaluating the truth of the witnesses' testimony."¹¹²

III. IMPEACHMENT

A. Inquiry Into Validity of Verdict

In *Davis v. State*,¹¹³ Davis argued several issues on appeal, including that his constitutional rights were violated because some jurors saw him in handcuffs, and other jurors may have overheard rumors that Davis' family had called in bomb threats to the courthouse. The court held that these incidents did not warrant a mistrial because Davis could not show that the incidents caused him any actual harm.¹¹⁴

Davis claimed that the subsequent questioning of the jurors about viewing Davis in restraints and knowledge of the bomb threat violated Rule 606(b). However, the court noted that it did not. The court stated that "Rule 606(b) permits a juror to testify concerning 'whether extraneous prejudicial information was improperly brought to the jury's attention' or 'whether any outside influence was improperly brought to bear upon any juror.'"¹¹⁵ The court found this questioning entirely proper as both the defense and prosecution had asked proper questions, and each juror denied that either item had any bearing on their verdict.¹¹⁶

In *Majors v. State*,¹¹⁷ Majors appealed his conviction for murder, arguing several issues related to jury conduct. During the trial, the judge became aware that a particular juror was making improper facial expressions and passed a note through the bailiff, cautioning the juror. After announcement of the verdict, the juror signed an affidavit saying the note from the judge had upset and frightened her. Majors contended this was an improper and prejudicial ex-parte

111. See *Turney*, 759 N.E.2d at 676-77.

112. *Id.* at 677 (quoting *Saylor v. State*, 559 N.E.2d 332, 335 (Ind. Ct. App. 1990)). The court also noted that the State's theory at trial was that the victim was innocent and sexually pure. See *id.*

113. 770 N.E.2d 319 (Ind. 2002).

114. *Id.* at 325-26.

115. *Id.* at 325 n.4 (quoting IND. R. EVID. 606(b)).

116. *Id.* (citing Record at 914-24).

117. 773 N.E.2d 231 (Ind. 2002).

communication requiring reversal.¹¹⁸ The court found this note innocuous and within the proper discretion of the trial court to control and manage the jury.¹¹⁹

Majors also argued that the jury was improperly influenced during activities outside of deliberations and the court room. He first claimed that one juror ordered two beers after hours and drank them in his hotel room. To support his contention, he referred to *Schultz v. Valle*,¹²⁰ in which the verdict was found invalid because jurors had drank alcohol during deliberations. However, in this case the juror had only consumed alcohol after deliberations had ceased for the day, a full night before the next day's deliberations would resume. The court held that Majors had not demonstrated gross misconduct or probable harm.¹²¹

Majors next argued that the jury was improperly influenced by the presentation of a birthday cake from the judge, a few bottles of wine from the sheriff's wife, and transportation of the jurors to a cookout and fishing trip by bailiffs and local law enforcement. Majors argued that this fraternization with law enforcement personnel led the jury to improperly favor the State. The court found that the trial court had not abused its discretion in rejecting these arguments because nothing in the record showed that Majors suffered any prejudice as a result of the outings or gifts or that the jury's verdict was influenced by the events.¹²²

Majors argued that the jury improperly discussed parts of the trial prior to deliberations, including a juror affidavit stating that jurors made comments during trial about physical characteristics of State and defense attorneys, and about how one defense attorney questioned witnesses. The court held that this claim was an attempt to impeach the verdict, which is not allowed under Rule 606(b).¹²³ In a footnote, the court restated Rule 606(b), which precludes juror testimony, except as "(1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror."¹²⁴ In regard to the totality of Majors' jury-related objections, the court found that Majors had not demonstrated an "interest sufficient to overcome the interests of finality of verdicts and avoidance of juror harassment."¹²⁵

In *Hall v. State*,¹²⁶ Hall appealed the trial court's denial of his request to depose members of the jury that had found him guilty of murder and neglect of a dependent. During the course of the trial, a stepson of one of the jurors had

118. *See id.* at 234.

119. *Id.*

120. 464 N.E.2d 354 (Ind. Ct. App. 1984).

121. *See Majors*, 773 N.E.2d at 235-36.

122. *See id.* at 236.

123. *See id.* at 236-37.

124. *Id.* at 237 n.5 (quoting IND. R. EVID. 606(b)).

125. *Id.* at 238. Majors also argued that the mention of polygraph evidence was error. The admission of such evidence was found to have had little effect and to be harmless. *Id.* at 238-39.

126. 760 N.E.2d 688 (Ind. 2002).

relayed to the juror that he believed Hall was innocent, but later relayed to the juror's wife that he now believed Hall was guilty. The juror had then relayed this information to the jury. Significantly, this appeal took place during the pendency of the motion to correct errors, which already contained affidavits from jurors relaying the alleged facts.¹²⁷

Hall asserted that his constitutional right to confront witnesses against him extended to the right to depose members of a jury to determine if misconduct occurred during the trial or deliberations. In analyzing this case, the court looked to a recent decision of the Indiana Supreme Court, *Griffin v. State*.¹²⁸

In *Griffin*, the Indiana Supreme Court recognized the importance of "protecting a defendant's right to confront witnesses, 'which may be violated if a jury considers information that was not in evidence.'"¹²⁹ However, the Indiana Supreme Court determined in *Griffin* that the common law prohibition against a juror testifying about how an outside influence affected him survived the adoption of Rule 606(b), meaning that the "defendant's right to confront witnesses was not violated if the jury could testify to the existence of a 606(b) exception, but not the effect that the influence had on them."¹³⁰

The *Hall* court further cited *Griffin* to show that the State has a paramount interest in limiting discovery regarding juror misconduct. This interest is based on "concerns of post-verdict jury tampering, defeating the jury's solemn acts under oath, and the possibility that dissatisfied jurors would attempt to destroy a verdict after assenting."¹³¹ The court did find, however, that the deposition of jurors may be used when appropriate, such as in situations where "the risk of prejudice is substantial, as opposed to imaginary or remote."¹³² The court suggested that a more appropriate method in these circumstances would be "*in camera* interviews with jurors to determine the extent to which they were exposed to prohibited information and the potential prejudice that resulted."¹³³ In summation, the court held that

following the previous interpretations of 606(b) and the common law views of jury impeachment, we find no basis for mandating that a party has the right to depose the jury. Rather, the appropriate method to be used for determining prejudice when there are allegations of jury misconduct is best left to the discretion of the trial court.¹³⁴

In *South Bend Clinic v. Kistner*,¹³⁵ the issue on appeal was also jury misconduct. Certain members of the jury had consulted dictionaries for

127. *See id.* at 689.

128. 754 N.E.2d 899 (Ind. 2001).

129. *Hall*, 760 N.E.2d at 690 (quoting *Griffin*, 754 N.E.2d at 902).

130. *Id.* (citing *Griffin*, 754 N.E.2d at 903).

131. *Id.* at 691 (citing *Griffin*, 754 N.E.2d at 902).

132. *Id.* at 692 (citing *Agnew v. State*, 677 N.E.2d 582, 584 (Ind. Ct. App. 1997)).

133. *Id.*

134. *Id.*

135. 769 N.E.2d 591 (Ind. Ct. App. 2002).

definitions of words after the trial judge had refused the request. The court noted that “a jury’s verdict may not be impeached by the testimony of the jurors who returned it,”¹³⁶ and that an exception to that rule exists where “there is evidence demonstrating that the jury was exposed to improper, extrinsic material during its deliberations, and when a substantial possibility exists that the verdict was prejudiced by the improper material.”¹³⁷ Using this criteria, the court determined that there was no evidence that consulting a dictionary affected the jury’s deliberations or in any way resulted in prejudice to the defendants.¹³⁸

B. Violation of Separation of Witnesses Order

In *Jiosa v. State*,¹³⁹ Jiosa appealed convictions for child molestation and for being a habitual offender. At trial, the judge had ordered separation of the witnesses. A non-testifying witness had been outside the courtroom and overheard Jiosa’s father shouting details of the current testimony.¹⁴⁰ The witness in the hallway contacted the defense counsel, offering to testify as to an alternate explanation of the testimony previously offered. The trial court excluded this testimony based on the separation of witnesses order.¹⁴¹

In considering whether this exclusion was proper, the court looked to established case law regarding Rule 615. Rule 615 sets out the circumstances for use of a separation of witnesses order, but does not specifically address remedies for violations of such an order.¹⁴² The court stated that it was not clear that a violation of the order had occurred, but assumed one for the purposes of discussion. Based on the facts that the proffered witness had inadvertently overheard the repeated testimony, the court relied upon the common law rule that “it is an abuse of discretion to exclude witnesses for violations of a separation order when the party seeking to call the witness had no part in the violation of the order.”¹⁴³ The court found that the trial court had abused its discretion and reversed the convictions.¹⁴⁴

In *Childs v. State*,¹⁴⁵ however, the court found that a witness had been properly prevented from testifying pursuant to a separation order. In *Childs*, a

136. *Id.* at 593 (citing *Ward v. Saint Mary Med. Ctr. of Gary*, 658 N.E.2d 893, 894 (Ind. 1995)).

137. *Id.* (citing IND. R. EVID. 606(b)(2); *Dawson v. Hummer*, 649 N.E.2d 653, 664 (Ind. Ct. App. 1995)).

138. *See id.*

139. 755 N.E.2d 605 (Ind. 2001).

140. *See id.* at 606.

141. *See id.*

142. *See id.* at 607. Rule 615 provides that “[a]t the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony or discuss testimony with other witnesses” IND. R. EVID. 615.

143. *Id.* at 608.

144. *See id.* at 609.

145. 761 N.E.2d 892 (Ind. Ct. App. 2002).

person not on the witness list (Childs' fiancé) had been present for part of the trial proceedings, and then offered testimony contradicting evidence introduced in her presence. The witness had remained in the courtroom after discussing the possibility of testifying with Childs. The trial court declared her a tainted witness and excluded her testimony.¹⁴⁶

Although the court of appeals considered the holding in *Jiosa*, it distinguished facts in the present case. The court held that once the defense became aware that the fiancé might testify, she became subject to the separation order, and that her testimony may have represented a shift in defense strategy that would have left the State at a disadvantage. Because the defense had a part in the violation of the separation order by not excluding the witness once it was discovered that she might testify, *Jiosa* did not apply and the remedy for violation of the separation order was within the discretion of the trial court.¹⁴⁷

In *Kirby v. State*,¹⁴⁸ Kirby argued that the trial court had abused its discretion by allowing two police detectives to remain at the State's table during the trial in violation of Rule 615. The State was allowed to exclude one detective from the separation order as an officer or employee of a party that is not a natural person, and the other detective as an essential witness.¹⁴⁹ While Rule 615 requires separation of witnesses at the request of a party, the rule

does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.¹⁵⁰

Kirby argued that one detective would have been sufficient to aid the State in its case. However, the State had demonstrated that both detectives had participated in the investigation and had interviewed separate witnesses. In preparation for the four to six week trial, the detectives had interviewed approximately 220 witnesses. In finding that the trial court had not abused its discretion, the appellate court said "[n]otwithstanding the important purpose of Rule 615 to minimize prospective witnesses from exposure to the testimony of other witnesses . . . we decline to find that the trial court abused its discretion. . . ."¹⁵¹

146. *Id.* at 895.

147. *Id.*

148. 774 N.E.2d 523 (Ind. Ct. App. 2002).

149. *See id.* at 537-38.

150. IND. R. EVID. 615.

151. *Kirby*, 774 N.E.2d at 538.

IV. OPINIONS AND EXPERT TESTIMONY

A. Appropriate Use of Expert Testimony

In *Miller v. State*,¹⁵² Miller appealed convictions for murder and criminal deviate conduct. Miller was a mentally-retarded individual who had provided incriminating answers to police interrogation (after being presented with extensive fabricated evidence by the police, including a fake fingerprint card, a fake computer printout, and false claims of eyewitness accounts). After finding that the incriminatory statements were indeed voluntary, the court considered whether or not the trial court had committed error in excluding the testimony of a psychologist called by the defense as an expert in “social psychology of police interrogation and false confessions.”¹⁵³

The proffered expert testimony would have discussed modern police interrogation techniques, how those techniques can lead to a false confession, and how to analyze the undisputed incriminating statements for indicia of whether or not they were true confessions.¹⁵⁴ Miller argued that, absent this expert testimony, he had no opportunity to demonstrate why a mentally retarded individual would admit to false accusations when presented with false evidence and police pressure. The State argued that the testimony was properly excluded because the facts of the confession were not in dispute, and alternatively that the exclusion of the proffered evidence was harmless.¹⁵⁵

The court first observed that a determination by a trial court that a statement was admissible and voluntary does not preclude the defense from challenging its weight and credibility.¹⁵⁶ This finding was based on the fact that “[t]he jury . . . remains the final arbiter of all factual issues under Article 1, Section 19 of the Indiana Constitution.”¹⁵⁷ The court stated that “[e]xpert testimony is appropriate when it addresses issues not within the common knowledge and experience of ordinary persons and would aid the jury.”¹⁵⁸ The court also referred to *Carter v. State*¹⁵⁹ for its holding that Rule 704(b) prohibits experts from testifying to intent, guilt or innocence, truth or falsity of testimony, or to legal conclusions. In *Carter*, the court held that “a psychologist’s testimony that autistic children find it difficult to deceive ‘came close to, but did not cross the line into impermissible Rule 704(b) vouching.’”¹⁶⁰

The court ultimately held that “the fact that the content of the interrogation

152. 770 N.E.2d 763 (Ind. 2002).

153. *Id.* at 770 (quoting Brief of Appellant at 17).

154. *See id.*

155. *See id.* at 772.

156. *See id.*

157. *Miller*, 770 N.E.2d at 772-73 (citing *Morgan v. State*, 648 N.E.2d 1164, 1170 (Ind. Ct. App. 1995)).

158. *Id.* at 773 (citing IND. R. EVID. 702(a)).

159. 754 N.E.2d 877, 882-93 (Ind. 2001).

160. *Miller*, 770 N.E.2d at 773 (quoting *Carter*, 754 N.E.2d at 883).

was not in dispute is not a proper basis on which to exclude Dr. Ofshe's testimony,"¹⁶¹ and that the trial court's determination of sufficient voluntariness for admissibility "did not preclude the defendant's challenge to its weight and credibility at trial."¹⁶² The court ordered a new trial for the appellant, stating that the psychologist's testimony would have aided the jury in understanding relevant aspects of police interrogation and interrogation of mentally retarded individuals, "topics outside common knowledge and experience."¹⁶³ In the event that some of the witness testimony might exceed the limits imposed on opinion testimony by Rule 704(b), the trial court may uphold individual objections as opposed to excluding the whole of this type of testimony, which would prevent the defendant from presenting a defense.¹⁶⁴

In *Cansler v. Mills*,¹⁶⁵ Cansler appealed from a summary judgment decision for the appellee. He had sued General Motors based on the allegation that his air bag had failed to open on impact, and that the air bag was defective. General Motors' motion for summary judgment was granted because it provided evidence that the vehicle complied with the 1994 Federal Motor Vehicle Standard, and that Cansler had failed to provide any expert witness testimony, which is required to rebut the presumption that the product was not defective. Cansler had submitted the deposition of an auto mechanic who examined the car after the accident, and concluded that the air bag should have deployed. However, the trial court ruled that the mechanic was not qualified to render an expert opinion, and his testimony was therefore inadmissible.¹⁶⁶

On appeal, Cansler argued that the mechanic's testimony was admissible because it was based on his observation and skill rather than on scientific principles.¹⁶⁷ The court stated that, under Rule 702, a witness can "be qualified as an expert by virtue of 'knowledge, skill, experience, training, or education,'"¹⁶⁸ and that only one of these characteristics is necessary to qualify someone as an expert.¹⁶⁹ A witness can be qualified as an expert on the basis of practical experience alone, but "expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."¹⁷⁰

Because the mechanic had never consulted on a defective air bag, never had air bag training, never attended classes relevant to the particular model of car,

161. *Id.*

162. *Id.*

163. *Id.* at 774.

164. *See id.*

165. 765 N.E.2d 698 (Ind. Ct. App. 2002).

166. *Id.* at 701.

167. *Id.* at 702.

168. *Id.* (quoting *Creasy v. Rusk*, 730 N.E.2d 659, 669 (Ind. 2000) (quoting IND. R. EVID. 702(a))).

169. *Id.* (citing *Creasy*, 730 N.E.2d at 669).

170. *Cansler*, 765 N.E.2d at 702 (quoting *West v. State*, 755 N.E.2d 173, 180 (Ind. 2001) (quoting IND. R. EVID. 702(b))).

and never worked designing, testing, or certifying air bag systems, the court determined that the mechanic did not have enough experience with air bag fundamentals to qualify as an expert. Although the court found that the trial court had not abused its discretion in failing to qualify the mechanic as an expert, it stated that “qualification under Rule 702 (and hence designation as an expert) is only required if the witness’s opinion is based on information received from others pursuant to [Indiana Evidence] Rule 703 or on a hypothetical question,”¹⁷¹ and that “[t]he testimony of an observer, skilled in an art or possessing knowledge beyond the ken of the average juror may be nothing more than a report of what the witness observed, and therefore, admissible as lay testimony.”¹⁷²

The court went on to say that “[s]killed witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge,”¹⁷³ and that to be admissible under Rule 701, opinion testimony of such a witness must be “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”¹⁷⁴

In this case, the mechanic’s testimony was based on years of experience working with salvaged vehicles that had suffered similar frame damage and with deployed air bags. His testimony about the damage to Cansler’s vehicle and comparisons to similarly damaged vehicles observed during his experience were merely a report of his personal observations. The court held that, while the mechanic was not qualified to testify as an expert, he could testify about observations from years of experience with damaged vehicles and from examining Cansler’s vehicle, and therefore the trial court had abused its discretion.¹⁷⁵

In *Haycraft v. State*,¹⁷⁶ Haycraft appealed his conviction for child molestation based in part on his claim that testimony by a state police investigator was improperly admitted because the detective had not qualified as an expert witness, and that the technique the detective discussed had not been established as a reliable scientific theory under Rule 702. The detective had testified that child molesters use a “grooming technique” to gradually introduce their intended victims to sexually explicit materials and acts before actually engaging in sex with them.¹⁷⁷

The court found that, as in *Cansler*, the witness had testified as a skilled witness rather than an expert witness. Because the State had shown that the

171. *Id.* at 703 (quoting 13 ROBERT LOWELL MILLER, JR., INDIANA EVIDENCE § 701.105, at 321 (2d ed. 1995)).

172. *Id.* (citing *Vasquez v. State*, 741 N.E.2d 1214, 1216 (Ind. 2001)).

173. *Id.* (citing MILLER, *supra* note 171, at 319-20).

174. *Id.* (quoting *Mariscal v. State*, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997) (quoting IND. R. EVID. 701)).

175. *Id.* at 704.

176. 760 N.E.2d 203 (Ind. Ct. App. 2001).

177. *Id.* at 210.

detective had significant training on the methodology of sexual abuse and profile of offenders, had investigated other sexual abuse cases and consulted sexual abuse training manuals, had been a detective with the State Police since 1993, had training beyond the common person in this field, and that his testimony was based on his personal experience as an investigator, he was sufficiently qualified to testify as a skilled witness. The court found that the trial court had not abused its discretion in admitting the testimony.¹⁷⁸

B. Reliability of Scientific Principles Utilized by Expert Witnesses

In the *Carter* case, discussed *supra*, the appellant also argued that bite mark evidence from a forensic odontologist should not have been admitted into evidence. Carter claimed that the bite mark evidence should not have been allowed because a proper foundation for this evidence's reliability was not laid pursuant to Rule 702. The odontologist had testified that the bite mark on the victim had been "more likely than not caused by the defendant."¹⁷⁹ Regarding testimony by expert witnesses, the court reiterated that Rule 702 provides:

- (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.
- (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.¹⁸⁰

Although the Indiana Supreme Court, in the 1977 *Niehaus v. State* case, found "no reason why [bite mark] evidence should be rejected as unreliable,"¹⁸¹ Carter argued that *Niehaus* did not control because it was decided before the landmark *Daubert v. Merrell Dow Pharmaceutical, Inc.*¹⁸² decision (which construed Rule 702 of the Federal Rules of Evidence), before the *Kuhmo Tire Co. v. Carmichael*¹⁸³ decision (which applied *Daubert* analysis to all types of expert testimony) and before Indiana's adoption of the Indiana Rules of Evidence (including Rules 702 (a) and (b)).¹⁸⁴

Carter argued that state standards cannot drop below the minimum standards guaranteed by the Federal Constitution, and that the *Kuhmo Tire* decision was binding on Indiana state court practice. However, the court pointed out that the U.S. Supreme Court had *not* held in *Kuhmo Tire* that Federal Rule of Evidence 702 was a constitutional requirement applicable to the states. The court therefore

178. *Id.* at 211.

179. *Carter v. State*, 766 N.E.2d 377, 380 (Ind. 2002).

180. *Id.* at 380 n.5 (quoting IND. R. EVID. 702).

181. *Id.* at 380 (quoting *Niehaus v. State*, 359 N.E.2d 513, 516 (Ind. 1977)).

182. 509 U.S. 579 (1993).

183. 526 U.S. 137 (1999).

184. *See Carter*, 766 N.E.2d at 380-81.

held that *Kuhmo Tire* is not binding on Indiana practice, and continued the analysis using Indiana authority.¹⁸⁵ Relying on *Niehaus* and *McGrew v. State*,¹⁸⁶ a similar case involving hair comparison analysis, the court said that “the bite mark method of identification in *Niehaus* ‘[was] simply a matter of comparison of items of physical evidence to determine if they are reciprocal,’”¹⁸⁷ and therefore the trial court had not abused its discretion in finding the bite mark evidence sufficiently reliable.

Another case involving expert testimony, *Armstrong v. Cerestar USA, Inc.*,¹⁸⁸ examined Rule 702 issues. *Armstrong* involved determining responsibility for injuries to an employee (Armstrong) of an independent contractor. The employee had become light-headed and fallen off a sludge tanker, which was owned by the independent contractor, but located on the premises of the company which had hired the independent contractor. Armstrong argued that the trial court had abused its discretion by striking the testimony of his expert witness. The witness had testified that Armstrong had been exposed to a hazardous concentration of hydrogen sulfide gas, the exposure caused Armstrong to become disoriented and fall, and that the substance would be considered hazardous material under OSHA guidelines.¹⁸⁹

The court noted that “Indiana Evidence Rule 702 requires that an expert be qualified as such by his knowledge, skill, experience, training, or education. Additionally, ‘an expert must have sufficient skill in the particular area of expert testimony before the expert can offer opinions in that area,’”¹⁹⁰ and “[m]oreover, questions of medical causation of a particular injury are questions of science necessarily dependent on the testimony of physicians and surgeons learned in such matters.”¹⁹¹

The court further noted that trial courts must assess the scientific validity of the reasoning or methodology underlying the testimony, whether such reasoning or methodology can properly be applied to the facts in issue, and that such knowledge admitted under Rule 702 is required to be more than unsupported speculation or a subjective belief.¹⁹²

Although a review of the expert’s credentials showed he had an MBA degree, a master’s degree in Health and Safety Studies and had years of experience in various roles in Environmental and OSHA, the expert admitted that

185. *Id.* at 381.

186. 682 N.E.2d 1289 (Ind. 1997).

187. *Carter*, 766 N.E.2d at 381 (quoting *Niehaus v. State*, 359 N.E.2d 513, 516 (Ind. 1977); cf. *Jervis v. State*, 679 N.E.2d 875, 881 (Ind. 1997) (observations of a witness with specialized knowledge, and the physical evidence related to it, are not “scientific principles” governed by Rule 702(b)).

188. 775 N.E.2d 360 (Ind. Ct. App. 2002).

189. *Id.* at 365-66.

190. *Id.* at 366 (quoting *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674, 679 (Ind. Ct. App. 2000)).

191. *Id.*

192. *Id.*

he did not conduct any of his own tests (he relied on tests done by others not done on the day of the accident), he did not attempt to calculate the level of hydrogen sulfide Armstrong may have been exposed to (because no reliable method of testing was known), and that while factors such as temperature, wind, and humidity could affect such a test, he did not have any of this data for the day of the accident. He also did not know Armstrong's weight or height, had never examined the tanker, and had never been involved in a similar case.¹⁹³

The expert's opinions had concluded that Armstrong had been exposed to a dangerous level of hydrogen sulfide, that he became ill from the exposure, and that the material he was working with was hazardous under OSHA regulations. However, the underlying data for these conclusions were tests done by others long before the accident or done a day or more after the accident under different weather conditions.¹⁹⁴

The court conceded that one could suspect that exposure to this gas at certain levels could cause health problems, but noted that the expert was not a licensed physician with the requisite experience and knowledge to testify as to the proximate cause of Armstrong's fall being exposure to hydrogen sulfide. Armstrong also failed to offer evidence excluding other possible causes for his fall. Although the expert's credentials in other areas were impressive, the cause of the fall was a question of medical causation, and such testimony must be offered by a physician or surgeon with experience in the area.¹⁹⁵

Finally, the court said that although the expert could be found by a court to be an expert on OSHA matters due to his current and previous employment, any determination under OSHA rules would be irrelevant because an OSHA standard cannot be used to expand an existing duty of care.¹⁹⁶

In its holding as to this subject, the court said that "[f]or all of these reasons, we conclude that [the expert's] opinions were unreliable, no more than subjective belief or unsupported speculation,"¹⁹⁷ and that the trial court did not abuse its discretion in striking this testimony.¹⁹⁸

C. Expert Opinions Regarding Criminal Intent, Guilt or Innocence

In *Moore v. State*,¹⁹⁹ the petitioner argued on appeal that the trial court had improperly excluded expert testimony regarding his awareness at the time of the crime. The proffered evidence consisted of testimony by a psychiatrist that, in his opinion, Moore had been unaware he was shooting at a police officer, and

193. *Armstrong*, 775 N.E.2d at 367-68.

194. *Id.*

195. *Id.* at 368 (citing *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674, 679 (Ind. Ct. App. 2000)).

196. *Id.*

197. *Id.* In other words, no matter how smart you are, you can't make stuff up.

198. *See id.*

199. 771 N.E.2d 46 (Ind. 2002).

that Moore was surprised it turned out to be a police officer.²⁰⁰

The court reiterated Rule 704(b), which states in part that “[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case,”²⁰¹ and concluded that the testimony “would have directly reflected on the defendant’s intent, guilt, or innocence, and thus was an inadmissible conclusion regarding intent.”²⁰² The court therefore found that the trial court had not abused its discretion, and affirmed the sentence of death.²⁰³

V. HEARSAY

A. *State of Mind*

In *Simmons v. State*,²⁰⁴ Simmons was accused of the murder of his former fiancé. A portion of the evidence against him at trial was statements by Officer Powell and Elijah Bowman that the victim had been afraid of Simmons, and that Simmons had previously threatened her with a gun. The trial court ruled that Bowman could testify that the victim feared Simmons and that her intent was to call off the wedding, but that this evidence could not be used to prove Simmons’ prior bad act of threatening the victim with a gun. The trial court also ruled that the police officer could testify that he responded to an earlier 911 call from the victim, and that the victim, while in an excited state, had claimed that Simmons had threatened her with a gun.²⁰⁵

The court found that Bowman’s testimony was admitted pursuant to Rule 803(3), which provides that “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)”²⁰⁶ is not excluded by the hearsay rule, even though the declarant is available as a witness.²⁰⁷ However, the court then examined whether or not this evidence met the requirement that only relevant evidence is admissible.²⁰⁸ This analysis turned on the rule that a victim’s state of mind is relevant when it has been put in issue by the defendant.²⁰⁹ In this case, Simmons had not put the victim’s state of mind at issue. Simmons’ defense was that he was not at the scene of the crime. Because the victim’s fear was not relevant to any issue and Simmons did not put the victim’s state of mind at issue, the trial court abused its discretion by allowing Bowman to testify as to

200. *Id.* at 55.

201. *Id.* (quoting IND. R. EVID. 704(b)).

202. *Id.* (citing *Jackson v. State*, 728 N.E.2d 147, 153 (Ind. 2000)).

203. *Id.*

204. 760 N.E.2d 1154 (Ind. Ct. App. 2002).

205. *See id.* at 1158.

206. *Id.* at 1159 (citing IND. R. EVID. 803(3)).

207. *Id.*

208. *Id.* at 1160 (citing IND. R. EVID. 402).

209. *Id.* (citing *Angleton v. State*, 686 N.E.2d 803, 809 (Ind. 1997) (citing *Taylor v. State*, 659 N.E.2d 535, 543 (Ind. 1995))).

Simmons' threats and the victim's fear of him. However, this was found to be a harmless error due to the strength of the remaining evidence.²¹⁰

B. Startling Event or Condition

The court next considered the testimony of Officer Powell. Officer Powell testified that he had responded to a 911 call made by the victim, and that she had informed him that Simmons had threatened her with a gun. However, the trial court specifically noted that it was not admitting this evidence under Evidence Rule 404(b). The trial court did admit this evidence under the excited utterance exception to the hearsay rule.²¹¹ Rule 803 provides that "the following are not excluded from the hearsay rule, even though the declarant is unavailable as a witness . . . (2) [A] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."²¹²

Although Officer Powell's testimony did fall under this exception, the court found that the admission of this testimony was also erroneous, because its only possible relevance was to show that Simmons was capable of committing the crime charged. The evidence was inadmissible because it violated Rule 404(b), which requires that "the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act."²¹³ However, the court found that this was also harmless error.²¹⁴

C. Business Records

In *Greco v. KMA Auto Exchange, Inc.*,²¹⁵ Greco argued that the trial court had improperly admitted the relevant security agreement because a sufficient foundation had not been presented to establish that the document was made at or near the time of the transaction pursuant to Rule 803(6).²¹⁶ Rule 803(6) excepts certain business records from the hearsay rule if they meet the following criteria:

[A] memorandum . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity, and if it was the regular practice of that business activity to make the memorandum, . . . all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation

210. *Id.*

211. *See id.*

212. IND. R. EVID. 803(2).

213. IND. R. EVID. 404(b).

214. *Simmons*, 760 N.E.2d at 1161-62.

215. 765 N.E.2d 140 (Ind. Ct. App. 2002).

216. *Id.* at 145.

indicate a lack of trustworthiness.²¹⁷

KMA's general manager testified at trial that he had been involved in the sale of the truck, he was the keeper of the records at KMA, and the document was signed and kept as a part of KMA's regular business activity. Even though the manager had not personally signed the document, his testimony that he had been involved in the sale created a sufficient foundation for the trial court to conclude that the security agreement was made at or near the time of the transaction.²¹⁸ The court found that the trial court had not abused its discretion in admitting the security agreement into evidence.²¹⁹

D. Public Records

In *Baxter v. State*,²²⁰ a victim had been lured into Baxter's home while Baxter was on in-home detention. The victim identified Baxter the following day, but was unable to positively identify Baxter at Baxter's revocation hearing.²²¹ The State then offered into evidence the Probable Cause Affidavit that Officer Wallace had prepared in association with the robbery case.²²² On appeal, Baxter argued that the State's exhibit was unreliable hearsay and thus inadmissible.²²³

An important element of this case is that it is an appeal from a probation revocation hearing. "[P]robationers are not entitled to the full array of constitutional rights afforded defendants at trial,"²²⁴ and "in probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay."²²⁵ Even with this lower standard for admissibility, the court found that the trial court erred in admitting the report into evidence because it bore no substantial indicia of reliability.²²⁶

In a previous probation revocation hearing case, *Pitman v. State*,²²⁷ the court had found similar evidence admissible, but the State had introduced certified copies of the police report, the court docket, and charging information. That information was found to be relevant and the certification of the documents by the court provided substantial verification of their reliability.²²⁸ However, in *Baxter*, the document called a "Probable Cause Affidavit" was actually a "Law Enforcement Incident Report," and it was uncertified, unverified and unsigned

217. *Id.* (quoting IND. R. EVID. 803(6)).

218. *See id.* (citing *Williams v. Hittle*, 629 N.E.2d 944, 948 (Ind. Ct. App. 1994)).

219. *See id.*

220. 774 N.E.2d 1037 (Ind. Ct. App. 2002).

221. *See id.* at 1038-39.

222. *Id.* at 1041.

223. *Id.* at 1042.

224. *Id.* (quoting *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999)).

225. *Id.*

226. *Id.* at 1044.

227. 749 N.E.2d 557 (Ind. Ct. App. 2001).

228. *Id.*

by the arresting officer or the author of the report. The court disagreed with the State's contention that the report contained substantial indicia of reliability because it was prepared by a law enforcement officer during the course of his official investigation and corroborated the victim's testimony.²²⁹

In deciding that the document was not reliable, the court observed that "investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case, do not fall within the public records exception to the hearsay rule, an indication that such reports are not considered inherently reliable."²³⁰ The court stated that the document also did not corroborate the victim's testimony.²³¹

In *Garling v. Indiana Department of Natural Resources*,²³² Garling questioned the admission of a public record under Rule 803(8), claiming that it lacked the required trustworthiness. Rule 803(8) provides in part that public records are admissible "unless the sources of information or other circumstances indicate a lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and recorded activities"²³³

Garling claimed that the evidence admitted lacked the required level of trustworthiness because the signatories of the document had also performed the notarization of the document. The court found it problematic that the notary was also a signatory in violation of Indiana statutory law, which provides that a "notary public shall not . . . acknowledge any instrument in which the notary's name appears as a party to the transaction."²³⁴ However, the court ruled that a determination of this document's trustworthiness was unnecessary because same or similar evidence had been submitted without objection.²³⁵

E. Excited Utterance

In *Marcum v. State*,²³⁶ Marcum appealed his conviction for domestic battery, alleging that hearsay evidence was improperly introduced against him at trial. When the State called Marcum's wife to testify against him, she recanted her earlier written allegations against Marcum. The trial court allowed introduction of the written statement, finding the statement to be either an excited utterance and/or a recorded recollection.²³⁷

229. *Id.* at 1043.

230. *Id.* (citing IND. R. EVID. 803(8); *cf.* *Hernandez v. State*, 716 N.E.2d 601, 602-03 (Ind. Ct. App. 1999)).

231. *Id.*

232. 756 N.E.2d 1029 (Ind. Ct. App. 2001).

233. IND. R. EVID. 803(8).

234. *Garling*, 756 N.E.2d at 1033 (quoting IND. CODE § 33-16-2-2 (1998)).

235. *Id.* (citing *R.R. Donnelley & Sons, Inc. v. North Texas Steel, Inc.*, 752 N.E.2d 112, 127 (Ind. Ct. App. 2001)).

236. 772 N.E.2d 998 (Ind. Ct. App. 2002).

237. *See id.* at 1000.

In order to consider whether the evidence was indeed an excited utterance, the court looked to Rule 803(2), which provides that in order for hearsay evidence to be admitted as an excited utterance, three elements must be found: “(1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event.”²³⁸ Because the statement in this case had been given two and a half days after the startling event, and the declarant had since gone to work, gone out with friends, and undertaken various other activities in the intervening days, the statement could not be admitted as an excited utterance. She had been capable of “thoughtful reflection and fabrication at the time she gave the statement.”²³⁹

The court turned to the issue of recorded recollection. This exception under Rule 803(5) was quickly dismissed as it provides that it is to be used in situations where the declarant has insufficient recollection of the matter at trial.²⁴⁰ Because Marcum’s wife had testified at trial that she did have a complete and accurate recollection of the relevant events, this exception could not apply. The State’s evidentiary focus was on this statement, and therefore the court found the admission of this evidence to be reversible error.²⁴¹

A second case involving excited utterance, *Cox v. State*,²⁴² involved statements made by an alleged domestic battery victim to a Deputy Sheriff shortly after the battery occurred. Cox argued on appeal that these statements should not have been introduced at trial by the deputy because the victim did not testify and the testimony did not fit into any hearsay exception.²⁴³

The court began by restating the text of rule 803(2), which provides that “the following are not excluded from the hearsay rule, even though the declarant is available as a witness (2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”²⁴⁴ The court stated that the portion of Rule 803(2) that allows the excited utterance exception to be used “even though the declarant is available as a witness,” means that “Rule 803 lists exceptions which are not hearsay regardless of whether the declarant is available.”²⁴⁵ Therefore, the court

238. *Id.* at 1001 (citing *Jenkins v. State*, 725 N.E.2d 66, 68 (Ind. 2000); IND. R. EVID. 803(2)).

239. *Id.* at 1002. The court cited previous cases which held that the key to the excited utterance calculation is whether the declarant was still under the stress of the event and therefore unlikely to make deliberate falsifications and be incapable of thoughtful reflection. *See Jenkins v. State*, 725 N.E.2d 66, 68 (Ind. 2000); *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996).

240. Rule 803(5) provides a hearsay objection for “a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly” IND. R. EVID. 803(5).

241. *Marcum*, 772 N.E.2d at 1002.

242. 774 N.E.2d 1025 (Ind. Ct. App. 2002).

243. *Id.* at 1026.

244. *Id.* at 1027 (quoting IND. R. EVID. 803(2)).

245. *Id.*

found that this testimony fit squarely into the excited utterance exception.²⁴⁶

F. Prior Statement By a Witness

In *Flake v. State*,²⁴⁷ Flake argued on appeal that the trial court erred when it allowed the State to rehabilitate its witness after impeachment on cross-examination. The facts in question were when the witness had informed Flake of her age, and how he had touched her. On cross-examination, the defense had elicited testimony from the witness favorable to the defendant. The trial court then allowed the State to rehabilitate the witness in both cases by introducing prior statements given in depositions and to the police that contained prior consistent statements.²⁴⁸

The court conceded that Rule 801(d)(1) provides that where “the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) consistent with the declarant’s testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose”²⁴⁹ However, the court noted that “because Rule 801(d) speaks only to the admission of prior consistent statements for their substance, we must look to pre-rule cases for the relevant common law on the rehabilitative use of these statements,”²⁵⁰ and that “[m]any pre-rules cases stated that prior consistent statements were admissible to rehabilitate witnesses.”²⁵¹

Because there was no recent fabrication, and the facts were similar to pre-evidentiary rules cases allowing such testimony for rehabilitative purposes, the court found that the trial court had not abused its discretion in allowing the rehabilitation of the witness, and that Rule 801(d)(1) need not have been applied.²⁵²

G. Statement of the Declarant’s Then Existing State of Mind

In *Mull v. State*,²⁵³ Mull contended that the trial court had erred in allowing penalty phase testimony by the victim’s roommate and one of the victim’s friends, who testified that the victim had believed the defendant to be weird, strange, and that he would watch her and talk to her and that the victim didn’t want to talk to him. The trial court admitted this testimony under the exception to the hearsay rule found at Rule 803(3), which provides that a “statement of the

246. *Id.*

247. 767 N.E.2d 1004 (Ind. Ct. App. 2002).

248. *See id.* at 1009-10.

249. *Id.* at 1009 (quoting IND. R. EVID. 801(d)(1)).

250. *Id.* (quoting *Moreland v. State*, 701 N.E.2d 288, 292 (Ind. Ct. App. 1998)).

251. *Id.*

252. *Id.* at 1011.

253. 770 N.E.2d 308 (Ind. 2002).

declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)"²⁵⁴ is excepted from the hearsay rule.

Mull argued that these statements were irrelevant because the victim's state of mind was irrelevant, that the victim's state of mind had no relevance on the charged aggravated circumstances (that the defendant had intentionally killed in the course of burglary and attempted rape), and that Mull had not placed the victim's state of mind at issue. However, the court agreed with the trial court that the victim's statements were not offered to prove that he was strange or weird, or to prove that he watched her, but rather to show that the victim had not consented to Mull's entrance to her apartment or to consensual sex with him, and therefore the testimony was properly admitted. The court further found that Mull had placed the victim's state of mind at issue by cross-examining a detective as to the claim that the victim had admitted Mull to her apartment.²⁵⁵

H. Statement by a Co-Conspirator

In *Lander v. State*,²⁵⁶ Lander challenged his convictions in part based on a claim that the State had inappropriately been allowed to question a co-conspirator regarding the co-conspirator's conversations with another regarding a robbery plan, and the co-conspirator's relaying of that plan to his girlfriend.²⁵⁷

The court noted that a co-conspirator's statement is not hearsay if the statement is given "by a co-conspirator of a party during the course and in furtherance of the conspiracy."²⁵⁸ The court also noted that the State is also required to prove that there is independent evidence of the conspiracy.²⁵⁹ "This means that the State must show that (1) existence of a conspiracy between the declarant and the party against whom the statement is offered and (2) the statement was made in the course and in furtherance of this conspiracy."²⁶⁰

Because the State did not offer any first-hand independent evidence that a conspiracy existed between the defendant and the parties involved in the statements, the State failed to meet the minimum requirements of Rule 801(d)(2)(E) with respect to this testimony. However, the court found the improper admission of the statements to be harmless error.²⁶¹

254. IND. R. EVID. 803(3).

255. See *Mull*, 770 N.E.2d at 311.

256. 762 N.E.2d 1208 (Ind. 2002).

257. See *id.* at 1213.

258. *Id.* (quoting IND. R. EVID. 801(d)(2)(E)).

259. *Id.* (citing *Lott v. State*, 690 N.E.2d 204, 209 (Ind. 1997)).

260. *Id.* (citing *Barber v. State*, 715 N.E.2d 848, 852 (Ind. 1999)); see also *Norton v. State*, 772 N.E.2d 1028 (Ind. Ct. App. 2002) (discussing allowable uses of the doctrine of completeness in regards to statements by a co-conspirator), *trans. denied*, *Norton v. State*, 2002 Ind. LEXIS 833 (Ind. 2002).

261. *Lander*, 762 N.E.2d at 1213-14; see also *Francis v. State*, 758 N.E.2d 528 (Ind. 2001) (observing that "consistent with Federal Rule of Evidence 801(d)(2)(E), our own rule 'applies not

VI. AUTHENTICATION OF DOCUMENTS

A. Admission of Pictorial Depictions

In *Bone v. State*,²⁶² Bone challenged the admission of pictorial depictions (depictions of nude underage children, allegedly recovered from Bone's computer). Bone contended it was error to admit the depictions without authentication, which under Rule 901(a) is a showing that the exhibits depicted actual children or what appeared to be actual children, as alleged in the information. The State contended that the authentication requirement was satisfied by demonstrating that the images contained in the exhibits were recovered from Bone's computer.²⁶³

Rule 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."²⁶⁴ The court also stated that "showing of authenticity is 'a finding that it is what its sponsor purports it to be.'"²⁶⁵ The court determined that the testimony before the trial court had been sufficient to establish the authenticity of the exhibits as depicting the information contained in Bone's computer.²⁶⁶

VII. EVIDENCE OUTSIDE THE RULES

A. Opening the Door

In *Wales v. State*,²⁶⁷ Wales was granted a petition for rehearing of *Wales v. State*,²⁶⁸ in which the court had determined that the fact that the trial court had failed to conduct the balancing test of Rule 609(b) was moot, because Wales had opened the door to this evidence by testifying about it in his own defense.²⁶⁹ On rehearing, the court considered Wales' alternate argument, that the trial court had failed to conduct the required balancing test of Rule 403, and that a defendant cannot open the door to evidence when Rule 403 is the basis of the objection. The court noted its previous decision regarding Rule 609(b) evidence, and reached the same result regarding the Rule 403 test: "Inadmissible evidence may become admissible where the defendant 'opens the door' to questioning on that

only to conspiracies but also to joint ventures, and that a charge of criminal conspiracy is not required to invoke the evidentiary rule." *Id.* at 533 n.5 (quoting *United States v. Kelley*, 864 F.2d 569, 573 (7th Cir. 1989)).

262. 771 N.E.2d 710 (Ind. Ct. App. 2002).

263. *See id.* at 716.

264. IND. R. EVID. 901(a).

265. *Bone*, 771 N.E.2d at 716 (quoting *MILLER*, *supra* note 171, § 901.101).

266. *Id.* at 716-17.

267. 768 N.E.2d 513 (Ind. Ct. App. 2002).

268. 774 N.E.2d 116 (Ind. Ct. App. 2002).

269. *See id.*

evidence.”²⁷⁰

B. Flight as Evidence of Guilt

In *Anderson v. State*,²⁷¹ Anderson appealed his convictions in part based on a claim that the trial court erred when it allowed the State to present evidence that law enforcement officials found the defendant in Birmingham, Alabama about one month after the victim was shot. Among his arguments, Anderson claimed that there was no evidence to demonstrate that his flight was immediate, and that there was no evidence to explain why he was in Alabama. He also tied these claims to Rule 403 by stating that the probative value of such evidence was outweighed by its prejudicial effect.²⁷²

While the court noted that “[a] jury may consider evidence of flight of the accused immediately after the commission of a crime as evidence of his consciousness of guilt,”²⁷³ it noted that Anderson had fled the scene of the crime, could not be found at any of his known addresses in the days following the commission of the crime, and that Anderson had no known previous addresses in Alabama.²⁷⁴

As to Anderson’s claim that no evidence had been offered as to why he would be in Alabama, the court held that “the jury in this case reasonably could have inferred that he had fled the scene of the crime and his community in an effort to avoid prosecution, which was sufficient to allow this evidence to be introduced.”²⁷⁵

C. Voice Identification as Direct Evidence

In *Jackson v. State*,²⁷⁶ Jackson argued that the trial court had improperly denied his request for a jury instruction regarding a finding of guilt when all of the evidence was circumstantial. The court found that this instruction was inappropriate. Even though no prior case had determined whether or not voice identification evidence is direct evidence, the court held that

voice identification evidence that places the defendant at the crime scene

270. *Wales*, 774 N.E.2d at 117 (citing *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000)). In fact, the court pointed out that Rule 403 is weighted toward admission of evidence, whereas Rule 609(b) is weighted against the admission of evidence. Thus, having already ruled on admissibility of evidence in this circumstance under Rule 609(b), it was a simple matter to rule that similarly-situated evidence is admissible under the more permissive Rule 403 analysis.

271. 774 N.E.2d 906 (Ind. Ct. App. 2002).

272. *See id.* at 910-11.

273. *Id.* at 910 (quoting *Seeley v. State*, 547 N.E.2d 1089, 1092 (Ind. 1989)).

274. *See id.* at 911.

275. *Id.* (citing *Bruce v. State*, 375 N.E.2d 1042, 1078 (Ind. 1978) for the proposition that where reasonable jurors could place either of two differing interpretations on a set of facts, and one of those interpretations is material to the case, evidence of those facts is admissible).

276. 758 N.E.2d 1030 (Ind. Ct. App. 2001).

at the precise time and place of the crime's commission is direct evidence. It is an identification of the defendant as the perpetrator of the crime based on the use of the witness' personal senses, even if the sense involved is hearing, not sight.²⁷⁷

CONCLUSION

While the decisions described herein answer many questions regarding interpretation of the Indiana Rules, many more subjects remain open to interpretation. The cases discussed above represent only a very small fraction of the cases decided in a one-year period in the courts of Indiana.

The Rules have not yet reached their ten-year anniversary, and much remains open to interpretation. Because the Rules are still young in terms of their judicial interpretation, they are susceptible to rapid change due to court decision, statutory gap-filling and the advent of new technology (such as the application of the completeness doctrine to videocassette evidence).

As noted two years ago in this space, academicians and practitioners should continue to keep a close watch on developments in interpretations of the Rules.

277. *Id.* at 1036.

SURVEY OF RECENT DEVELOPMENTS IN HEALTH CARE LAW

JOHN C. RENDER*

INTRODUCTION

As in most other recent years, the 2002 survey year was marked by several significant and instructive developments in the ever-expanding field of health care law. The emphasis of this Survey is upon those issues of most immediate import to the health care law practitioner. This Survey is neither comprehensive nor exhaustive in detail, but instead focuses on important additions or modifications to law and regulation. In the discussion below, this article will address developments respecting: i) reimbursement under the Medicare and Medicaid programs; ii) fraud and abuse and the Stark law and regulations; iii) federal income taxation; iv) provider malpractice liability; v) labor and employment law; vi) Indiana health care legislation; vii) the federal HIPAA Regulations; and, viii) federal case law respecting the constitutionality of certain health care-related business and the reach of the ERISA preemption.

I. REIMBURSEMENT

A. *Medicare: Regulations*

1. *Medicare Provider-Based Rule Changes.*—On August 1, 2002, CMS¹ published changes to the provider-based rules in the annual update to Medicare hospital inpatient prospective payment systems.² In general, the status of an entity as either provider-based or freestanding determines the Medicare reimbursement amount it may receive for providing services. If an entity is considered provider-based, it may bill for services as though the services were provided in a hospital. Overall, these changes to the provider-based rules are positive for health care providers in that they broaden what were rather narrow requirements that an entity had to meet in order to obtain provider-based status.

The effective date of the rule changes depends on the facility's original status. For a facility treated as provider-based as of October 1, 2000, the new rules are effective for the facility's first cost reporting period beginning on or after July 1, 2003.³ The effective date for every other entity was October 1, 2002. Both procedural and substantive changes were made, including the recognition of a distinction between on-campus and off-campus provider-based entities.

The final rule eliminates the need for an entity to seek CMS's conferral of

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1. Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services.

2. 42 C.F.R. § 413.65(b)(2) (2002).

3. *Id.*

provider-based status. Rather, an entity now has the option voluntarily to self-attest to CMS that it qualifies as a provider-based entity. Moreover, an entity may begin billing as a provider-based entity even before CMS issues a ruling on an entity's provider-based status.⁴ However, if an entity fails to submit a self-attestation statement to CMS, the entity may face serious adverse consequences. If no statement is submitted and CMS subsequently determines the entity does not qualify as a provider-based entity, the entity will be subject to overpayment recovery for provider-based services for all prior cost reporting periods.⁵

Although CMS has not yet issued a uniform request or attestation form, the final rule did provide general guidelines an entity should follow in self-attesting. Regardless of whether an entity is an on-campus or off-campus entity, it should⁶:

- 1) provide the identity of the main provider and the facility or organization for which provider-based status is being sought;
- 2) identify each facility and state its exact location (that is, its street address and whether it is on-campus or off-campus);
- 3) list the date on which the facility became provider-based; and
- 4) provide "supporting documentation."

The regulations state that an on-campus entity only has to "maintain documentation [supporting] the basis for its attestations and to make [it] available to CMS . . . upon request."⁷ However, an off-campus entity must submit documentation in support of the attestation.⁸ The reason for this requirement is that the additional difficulty exists in determining whether an off-campus entity "is truly integrated with a main provider."⁹

The final rule also makes significant substantive changes that offer relief to providers desiring to utilize management contracts or to operate as partners in joint ventures. As seen in the procedural modifications, these changes also treat on and off-campus entities differently. The provider-based rules formerly required an entity to operate under the main provider's ownership and control in order to qualify for favorable reimbursement status. As a result, all non-management employees had to be employed by the provider, essentially defeating the purpose of a management contract. However, the final rule eliminates this requirement and now permits a provider to operate through a management contract.¹⁰ In addition, the final rule contains changes allowing an on-campus entity to be provider-based and to operate as a participant in a joint venture.¹¹

4. *Id.* § 413.65.

5. 42 C.F.R. § 413.65(l).

6. *See* 67 Fed. Reg. 49,982, 50,085 (Aug. 1, 2002) (to be codified at 42 C.F.R. pt. 405, 412, 413, 485).

7. 42 C.F.R. § 413.65(b)(3)(i) (2002).

8. *Id.* § 413.65(b)(3)(ii).

9. 67 Fed. Reg. 49,982, 50,087 (Aug. 1, 2002) (to be codified at 42 C.F.R. pt. 405, 412, 413, 485).

10. 42 C.F.R. § 413.65 (2002).

11. *Id.* § 413.65(f).

Off-campus entities have not been afforded the same substantive relief and are still subject to the same provider-based requirements as in the original regulations. However, off-campus entities have been granted some flexibility in utilizing management contracts since CMS clarified that a management company can hire or lease employees who provide patient care services “of a type that would be paid for by Medicare under a fee schedule.”¹²

Health care providers have generally welcomed these changes to the provider-based rules, particularly on-campus provider-based entities. Counsel for providers need to consider these changes in advising a client how to proceed in self-attesting and entering into a joint venture or management contract.

2. *Prospective Payment System for Long-Term Care Hospitals*.—Prior to the recent publication of CMS’s August 30, 2002 final rule implementing a prospective payment system for long-term care hospitals (individually, a “LTCH”, and collectively, “LTCHs”), Medicare reimbursed these facilities through a reasonable cost-based payment system.¹³ However, with the new prospective payment system (the “PPS”), LTCHs must now be more cost-effective in providing care. The PPS will develop diagnostic-related groups (“DRGs”) into which patients will be categorized based on the expected treatment and resources each will need. Medicare reimbursement will be based on the DRGs.

The new PPS took effect October 1, 2002, with a five-year phase-in period being adopted. Over the course of this period, the percentage of payments based on the PPS will increase while cost-based reimbursement payments will decrease.¹⁴ A LTCH is defined as a facility characterized by having an average inpatient length of stay greater than twenty-five days. Initially there was some debate whether CMS should count only the days in which Medicare covered a patient’s cost of care in determining whether a facility qualified as a LTCH. However, CMS clarified in the final rule that it will “count *all* the days in a Medicare patient’s stay (covered and noncovered days) that is, total days, in the LTCH in calculating whether a LTCH meets the average 25-day length of stay requirement.”¹⁵

In charging Medicare beneficiaries, a LTCH may not bill a beneficiary for any amount greater than the deductible and coinsurance for which Medicare has made a full DRG payment. This rule applies even if the LTCH’s cost of furnishing services to that beneficiary is greater than the PPS payment it received.¹⁶ However, CMS created an exception to this rule for a Medicare payment for a short-stay outlier case that is less than the pertinent full LTCH-

12. *Id.* § 413.65(h)(1).

13. Medicare providers have been paid reasonable costs, as determined by CMS, necessary to the care and treatment of Medicare beneficiaries.

14. 42 C.F.R. § 412.533 (2002).

15. 67 Fed. Reg. 44,954, 55,971 (Aug. 30, 2002) (to be codified at 42 C.F.R. pt. 412, 413, 476).

16. 42 C.F.R. § 412.507 (2002).

DRG payment amount.¹⁷ In addition, the final rule requires a LTCH to furnish covered services to Medicare beneficiaries either directly or under an approved arrangement.¹⁸ Moreover, CMS will not pay any provider or supplier, but instead only the LTCH, for services provided to a Medicare beneficiary who is an inpatient of the LTCH.¹⁹ Certain services not included as inpatient hospital services, however, may be excluded.

The new regulation also requires that a LTCH establish a Quality Improvement Organization (a "QIO") to review and monitor the quality of the care provided by the LTCH. The LTCH's performance in the following areas is to be reviewed: the medical necessity, reasonableness, and appropriateness of the LTCH's admissions and discharges; the validity of the LTCH's diagnostic and procedural information; the completeness, adequacy and quality of the LTCH's furnished services; and the caliber of other medical services furnished by the LTCH to beneficiaries and the quality of LTCH's billing for such services.²⁰ In addition, physicians are now required to complete a statement acknowledging the beneficiary's principal and secondary diagnoses and any major procedures performed. If, after reviewing the information submitted by the QIO, CMS determines that the LTCH has made any misrepresentations, CMS may deny payment or require the LTCH to take necessary actions to prevent or correct the inappropriate practice.²¹ Finally, CMS must refer any determination of a pattern of such inappropriate practice that it makes to the Health and Human Services Office of Inspector General for review.²²

3. *Changes to the "Incident to" Billing Requirements.*—For a service to be considered "incident to" the services a physician provides in an office and, therefore, to be covered by Medicare, a service had to be furnished either by the physician or by an individual who qualified as an employee of the physician. CMS issued a final rule on November 1, 2001, changing the regulations by eliminating this requirement.²³

This final rule only addresses coverage of "incident to" services that are provided in noninstitutional settings, which the regulation defines as "all settings other than a hospital or skilled nursing facility."²⁴ Therefore, "incident to" services provided in a physician's office by a non-employee may be covered by

17. *Id.*

18. *Id.* § 412.509(c).

19. *Id.* § 412.509(b).

20. *Id.* § 412.508.

21. *Id.* § 412.508(c).

22. *Id.*

23. *Id.* § 410.26. There are additional requirements that must be met in order for a service or supply item to be covered and that were not modified. These additional requirements prescribe that the service or supply item must be: 1) an integral part of the physician's professional service; 2) commonly rendered without charge or included in the physician's bill; 3) of a type that are commonly furnished in physicians' offices or clinics; and 4) furnished under the physician's direct personal supervision.

24. *Id.* § 410.26(a)(5).

Medicare Part B, provided that the other pertinent requirements are still satisfied. The regulation specifically states that Medicare Part B will pay for services and supplies incident to the service of a physician (or other practitioner) if “furnished by the physician, practitioner with an incident to benefit, or auxiliary personnel.”²⁵ The term “auxiliary personnel” is defined as any individual who acts under the supervision of the physician, regardless of whether that individual is an employee of the physician, a leased employee, or an independent contractor.²⁶

Although the final rule did not repeal or alter the other requirements, including requiring the physician directly to supervise the auxiliary personnel in furnishing the “incident to” service, this modification is still significant. Providers now have more flexibility in structuring their arrangements and will have a greater likelihood of meeting the requirements and obtaining coverage for services performed.

B. Medicaid

1. Regulations.—

*a. Medicaid managed care and patients’ rights.*²⁷—On June 14, 2002, CMS issued a final rule that provides to Medicaid beneficiaries enrolled in managed care plans protections and rights similar to those provided beneficiaries who are in private plans.²⁸ These regulations took effect on August 13, 2002. Considering that in the year 2000 approximately fifty-six percent of Medicaid beneficiaries received some service through a managed care plan, this final rule will positively affect the coverage of millions of people.²⁹

Emergency room care is one of the more significant additional rights Medicaid beneficiaries in managed care plans will receive. In general terms, managed care plans of Medicaid beneficiaries must pay for emergency room services: 1) though no prior authorization is granted; 2) regardless of whether the medical facility has an existing contract with the managed care plan; 3) though the beneficiary turns out not to have a condition that required immediate care; or, 4) if the beneficiary obtained emergency services based on the instructions of a practitioner or other representative of the managed care plan.³⁰ In addition, the regulations prohibit a managed care plan from limiting what constitutes an emergency medical condition by listing or defining symptoms or diagnoses.

The regulation also outlines the general rule prohibiting a managed care plan

25. *Id.* § 410.26(b)(6).

26. *Id.* § 410.26(a)(1).

27. Please note that the regulations categorize the various types of managed care plans (i.e. MCO, PIHP, PAHP and PCCM), and sometimes create niche exceptions applicable to certain plans and not others.

28. 67 Fed. Reg. 40,989 (June 14, 2002) (to be codified at 42 C.F.R. pt. 400, 430, 431, 434, 435, 438, 440, 447).

29. *Id.* at 40,992.

30. 42 C.F.R. § 438.114 (2002).

from restricting communications and medical advice between a provider and a beneficiary.³¹ This is significant in that it protects the beneficiary's interest by ensuring that a provider will not refrain from dispensing medical advice because the advised treatment plan is not covered by the managed care plan.

Finally, the regulations have placed some procedural restrictions on managed care organizations. These restrictions include significantly limiting the marketing activities of managed care organizations, including prohibiting them from: 1) distributing marketing materials without State approval; and, 2) engaging in door-to-door, telephone or other cold-call marketing activities.³² In addition, Medicaid managed care organizations are now required to have an internal grievance process that meets state-specified timeframes.³³

b. Transferring income prior to medicaid eligibility.—On May 1, 2002, 405 Indiana Administrative Code title 405 rule 2-3-1.1 was amended by final rule of the Indiana Office of the Secretary of Family and Social Services to specify the methodology for calculating the Medicaid Eligibility Penalty for Transferring Income. The rule states that when the right to a stream of income is transferred at less than fair market value, the penalty on the transferor is calculated based on the projected total income expected to be transferred during the individual's lifetime. It further provides that transferred "income" includes, but is not limited to: 1) transferring income producing real property; and 2) accepting less than fair market rental value on properties rented.

The rule further provides that for purposes of the Medicaid eligibility penalty for transferring assets for less than fair market value, "assets" include any income or resources which the applicant or recipient or the applicant's or recipient's spouse is entitled to receive, but does not receive, because of a failure to take action to receive those assets.

The rule also defines "net income" to mean income produced by real property after deducting allowable expenses of ownership.³⁴ Additionally, the rule permits transfers of assets without affecting subsequent Medicaid eligibility if the transferor has purchased a "qualified long-term care insurance policy"³⁵ pursuant to Indiana Code section 12-15-39-6. If an asset is disregarded because it is used to purchase a qualified long-term care insurance policy, that asset and any income it otherwise would have generated are disregarded for purposes of Medicaid eligibility.

The rule further specifies that a transfer of assets includes a transfer of the

31. *Id.* § 438.102.

32. *Id.* § 438.104.

33. *Id.* § 438.400-24.

34. Allowable expenses of ownership if the owner is responsible for the expenses include property taxes, interest payments, repairs and maintenance, advertising expenses, lawn care, property insurance, trash removal expenses, snow removal expenses, utilities, or any other expenses of ownership allowed by the Supplemental Security Income program, 42 U.S.C. § 1381 (2000). Non-allowable expenses of ownership include depreciation, payments on mortgage principal, personal expenses of the owner, and capital expenditures.

35. This term has the meaning set out in IND. ADMIN. CODE tit. 760, r. 2-20-30 (2002).

right to receive income or a stream of income, the renting or leasing of real property, or the waiving of the right to receive a distribution from a decedent's estate, or the failure to take action to receive a distribution that the person is entitled to as a matter of law. A new subsection specifically addresses transfers of streams of income. The value of such income is determined by calculating the greater of the fair market value or the actual amount of total net income that property or another income source is expected to produce during the lifetime of the transferor based on life expectancy tables. Other new subsections of the rule set out the methods to calculate value of income related to less than fair market rental arrangements and to calculate the value of income declined by a beneficiary, entitled to receive a benefit under law who fails to act to effectuate receipt of the benefit. The amended rule eliminated some uncertainty regarding types of income that can be retained or transferred by potential Medicaid beneficiaries or their spouses.

2. *Statutes: Various Medicaid Program Modifications and Additions.*—Effective March 26, 2002, Senate Enrolled Act 228 made various changes in the Medicaid program including provision for deposit of rebates obtained by the Medicaid program either as required under 42 U.S.C. § 1396r-8(a) (2000) or voluntarily negotiated under a prescription drug program that is established or implemented to provide access to prescription drugs for low income senior citizens. The Act also provides that any money remaining at the end of the State's fiscal year in the Indiana Prescription Drug Account³⁶ or the Indiana Tobacco Master Settlement Agreement Fund³⁷ shall be available for a prescription drug program established or implemented to provide access to prescription drugs for low income senior citizens.³⁸ In addition, money in either account may be used to match federal funds available under a Medicaid waiver under which a prescription drug program is established or implemented to provide access to prescription drugs for low income senior citizens. The Act also provides for the establishment of a Therapeutics Committee as a sub-committee of the Drug Utilization Review Board.³⁹ The Therapeutics Committee is composed of five physicians licensed under Indiana Code section 25-22-5, with one physician with expertise in each of the areas of family practice, pediatrics, geriatrics, psychiatric medicine, and internal medicine with a specialty in the treatment of diabetes. Two members of the Therapeutics Committee shall be pharmacists who are licensed under Indiana Code section 25-26 and who have a Doctor of Pharmacy degree or an equivalent degree.

The purpose of the Committee is to identify pharmacological agents primarily characterized by a significant similarity of the bio-chemical or physiological mechanism by which these agents result in an intended clinical outcome. This allows the Committee to identify agents which are generically available and therapeutically equivalent to brand name drugs, thus assuring that

36. IND. CODE § 4-12-8-2 (2002).

37. *See id.* § 4-12-1-14.3(b)(1)-(3).

38. *See id.* § 4-12-8-2(b).

39. *See id.* § 12-15-35-20.5.

the most cost-effective and clinically-appropriate drug is utilized. The Act also prohibits the use of any prior authorization mechanism for the dispensing of anti-anxiety, anti-psychotic, or anti-depressant drugs under the Medicaid program, except for specific formularies or prior authorization programs operated by managed care organizations.

The Act also establishes a procedure for prior authorization for other types and classes of drugs and permits the Office of Medicaid Planning and Policy to limit quantities of drugs dispensed to beneficiaries.

The purpose of Senate Enrolled Act 228 is to address the significantly increasing costs of pharmaceutical supplies for Medicaid beneficiaries.

3. *Cases.*—

a. *Wisconsin Department of Health and Family Services v. Blumer*.⁴⁰—In *Blumer*, the United States Supreme Court overturned the court of appeals and held that the income-first method, used by a majority of states to determine the Medicaid eligibility of institutionalized married individuals, is valid and may continue to be utilized.⁴¹

In 1988, Congress enacted the Medicare Catastrophic Coverage Act ("MCCA"), which outlined certain requirements with which states had to comply in determining a couple's income and Medicaid eligibility.⁴² Because spouses often have joint assets and income, the purpose of MCCA was to prevent the non-institutionalized spouse ("community spouse") from intentionally impoverishing himself or herself just so that the institutionalized spouse would qualify for Medicaid.⁴³ Therefore, the MCCA requires states to set a "minimum monthly maintenance needs allowance" ("MMMNA") for the community spouse. It also provides that a portion of the couple's resources, known as the "community spouse resource allowance" ("CSRA"), be reserved for the benefit of the community spouse. A state is prohibited from including this allowance in the institutionalized spouse's income in determining Medicaid eligibility. The MCCA grants a couple the right to a hearing to petition for a higher CSRA amount, which would often have the effect of increasing the institutionalized spouse's chances of qualifying for Medicaid sooner. Most states utilize the income-first method to determine whether a higher CSRA is necessary. The income-first method considers whether potential income transfers from the institutionalized spouse to the community spouse negate the need for an increase in the CSRA.

Irene Blumer (the institutionalized spouse) applied for Medicaid coverage in 1996 through her husband and asked for an increase in their CSRA amount. In applying the income-first method, the county's hearing officer found that an increase was not permissible. Therefore, Blumer did not qualify for Medicaid at that time.⁴⁴ The Blumers appealed, arguing that the MCCA precluded the use

40. 534 U.S. 473 (2002).

41. *Id.*

42. 42 U.S.C. § 1396r-5 (2000).

43. *Blumer*, 534 U.S. at 480.

44. *Id.* at 487.

of the income-first method in making such determinations.⁴⁵

The Court stated that the decision turned on whether “the words ‘community spouse’s income’ may be interpreted to include potential, post-eligibility transfers of income from the institutionalized spouse” as permitted by the statute.⁴⁶ The Court found that the MCCA supported such interpretation, and in turn supported the use of the income-first method in implementing the MCCA.

b. *Indiana Family and Social Services Administration v. Culley*.⁴⁷—In *Culley*, the Indiana Court of Appeals held that the transfer of assets to a funeral trust was not subject to a Medicaid transfer penalty.⁴⁸ Shortly after moving into a nursing home, Irene Culley purchased funeral trusts that were to provide burial funds for her two adult children.⁴⁹ Two days after making this purchase, Ms. Culley applied for Medicaid.⁵⁰ Through the Family and Social Services Administration (“FSSA”), the State of Indiana delayed her eligibility for seven months, claiming that she made the funeral trust purchases in order to decrease her net worth and become Medicaid-eligible.⁵¹

The court rejected this argument, noting, “[a] Medicaid applicant may, in some circumstances, use her assets as did Culley to purchase burial spaces for her family members without being subject to a transfer penalty.”⁵² If, on the other hand, the Medicaid applicant transfers cash to a family member who then purchases a burial space, such a cash transfer is not exempt from the transfer penalty.⁵³ The court found no evidence to support the FSSA’s conclusion that the transfers made were in cash rather than in the form of funeral trusts, as claimed by Ms. Culley. The court “accordingly [found] that the agency abused its discretion in determining that Culley’s purchase of funeral trusts for her children and their spouses subjected her to a transfer penalty.”⁵⁴

45. *Id.* at 490.

46. *Id.* at 489.

47. 769 N.E.2d 680 (Ind. Ct. App. 2002).

48. *Id.*

49. *Id.* at 682.

50. *Id.*

51. *Id.* The Indiana Administrative Code provides that “if a Medicaid applicant who is an inpatient at a nursing facility disposes of assets for less than fair market value during a period of thirty-six months before she is institutionalized and has applied for medical assistance (the ‘look back date’), the applicant is ineligible for Medicaid for a certain period that is determined based on the value of the transferred assets.” *Id.* at 683 (quoting IND. ADMIN. CODE tit. 405, r. 2-3-1.1 (2002)).

52. *Id.*

53. *Id.* at 684.

54. *Id.*

II. FRAUD AND ABUSE

A. Cases

In *Healthscript, Inc. v. State*,⁵⁵ the Indiana Supreme Court reviewed the Indiana Medicaid Fraud statute, Indiana Code section 35-43-5-7.1 (a)(1), and found that it was “too vague to meet the requirements of due process.”⁵⁶ Healthscript, Inc. (“Healthscript”) provided pharmaceutical supplies to a long-term care facility and billed Medicaid for many of these supplies.⁵⁷ The government alleged that Healthscript grossly overcharged Medicaid, when compared to charges made for the same supplies to private payors.⁵⁸ Based upon this over-billing, Healthscript was charged with violating the Medicaid Fraud statute, which provides in relevant part, “A person who knowingly or intentionally . . . files a Medicaid claim, including an electronic claim, in violation of Indiana Code § 12-15 . . . commits Medicaid fraud, a Class D felony.”⁵⁹

The Indiana Supreme Court framed the case around the following question: Was the criminal statute “sufficiently definite to put Defendant on notice that its alleged conduct was proscribed?”⁶⁰ The court found that the statute failed the requirements of due process because “[t]he effect of the statute, then, is to say that a provider is prohibited from filing a Medicaid claim ‘in violation of’ nothing more specific than this vast expanse of the Indiana Code.”⁶¹ Due process requires that the law give “fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.”⁶² In so holding, the Indiana Supreme Court placed the burden on the Indiana legislature to proscribe fraudulent conduct in a manner that is sufficiently precise to place the “common world” on notice. It remains to be seen how the Indiana legislature will respond.

B. *Stark II, Phase I, Final Regulations*

Section 6204 of the Omnibus Budget Reconciliation Act of 1989,⁶³ commonly known as the Stark Law,⁶⁴ originally applied only to physician self-

55. 770 N.E.2d 810 (Ind. 2002).

56. *Id.* at 812.

57. *Id.*

58. *Id.* at 813.

59. *Id.* (quoting IND. CODE § 35-43-5-7.1(a)(1) (2002)).

60. *Id.*

61. *Id.* at 816.

62. *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971), where the United States Supreme Court described the rule of lenity as a component of due process).

63. Pub. L. 101-239, 103 Stat. 2106 (1989) (codified as amended at 42 U.S.C. § 1395nn (2000)).

64. So named for its progenitor, California Representative Fortney Pete Stark.

referrals to clinical laboratories. The Stark Law was amended in 1993⁶⁵ to extend to physician self-referrals encompassing a wide array of designated health services (“DHS”),⁶⁶ after which the law was commonly known as Stark II. Stark II enabled the Health Care Financing Administration (“HCFA”), now known as the Centers for Medicare and Medicaid Services (“CMS”),⁶⁷ to issue regulations implementing the statutory prohibitions against physician self-referrals. Stark II proposed regulations were issued in 1998,⁶⁸ and in 2001 the long-awaited Stark II final regulations (the “Phase I” regulations)⁶⁹ were promulgated. CMS has been promising Phase II final regulations under the Stark Law since it published the Phase I regulations.

This portion of the article will focus on the Phase I regulations and will identify the substantive changes introduced into the Stark Law in that final rule. The bulk of the Phase I regulations became effective on January 4, 2003.

1. *The General Statutory Prohibition.*—In bold strokes, the Stark Law provides that if a physician or a member of a physician’s immediate family has a financial relationship with a health care entity, the physician may not make referrals to that entity for the furnishing of DHS under the Medicare program, and the entity may not bill for the services, unless a statutory or regulatory exception exists.⁷⁰ The Social Security Act, which contains the Medicare and Medicaid laws, further extends the prohibitions of the Stark Law to patients covered by other federally funded health plans such as Medicaid. The Stark Law’s numerous exceptions and special rules necessitate rather detailed regulations to implement the statutory prohibitions.

2. *Key Provisions in the Phase I Regulations.*—Source of the important provisions of the Phase I Regulations are noted below.

a. *“Financial Relationship” between physician and entity.*—Financial relationships under the Stark Law include two varieties: ownership or investment interests, and compensation arrangements.⁷¹ The Phase I regulations

65. Pub. L. 103-66, 107 Stat. 312 (1993) (codified as amended at 42 U.S.C. § 1395nn (2000)).

66. DHS include the following: clinical laboratory services; physical therapy services; occupational therapy services; radiology services, including magnetic resonance imaging, computerized axial tomography scans, and ultrasound services; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment, and supplies; prosthetics, orthotics, and prosthetic devices and supplies; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services. 42 C.F.R. § 1395nn(h) (2002).

67. Effective July 1, 2001, HCFA changed its name to the Centers for Medicare and Medicaid Services. For consistency, this article continues to refer to the agency as CMS throughout.

68. 63 Fed. Reg. 1659 (Jan. 9, 1998) (to be codified at 42 C.F.R. pt. 411, 424, 435, 455).

69. Physicians Referrals to Health Care Entities with Which They Have Financial Relationships, 66 Fed. Reg. 856 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 424).

70. 42 U.S.C. § 1395nn(a)(1) (2000).

71. Physician Ownership of, and Referral of Patients or Laboratory Specimens to, Entities Furnishing Clinical Laboratory or Other Health Services, 42 C.F.R. § 411.354(a) (2002).

provide a definition of "financial relationship," and distinguish between direct and indirect financial relationships.⁷² The indirect financial relationship concept is of particular interest, as the Phase I regulations introduced a "knowledge" element into the equation, regardless of how remote the financial relationship may be. Entities are not under an "affirmative obligation to inquire as to indirect financial relationships," but have a duty of reasonable inquiry in the circumstances if there is reason to suspect an indirect financial relationship between the entity and a referring physician.⁷³ Entities and physicians are subject to the Stark Law prohibitions where the indirect financial relationship is deliberately ignored or recklessly disregarded.⁷⁴ The relevant test is whether some information that is available to the entity would put a reasonable person on alert that an indirect financial relationship may exist.⁷⁵

On its face, the indirect compensation arrangement definition excludes most compensation arrangements, such as square footage space leases, hourly or fixed medical director contracts, and any arrangement where the physician is paying the money.⁷⁶ Further, commentary to the Phase I regulations states that this definition encompasses the "universe" of financial relationships that may be subject to the Stark Law prohibitions.⁷⁷ While it may not be CMS' intent to exclude such arrangements from the purview of the Stark Law, this issue must be addressed in Phase II, and most likely will be. Since the purpose for the knowledge requirement is clearly to give some protection to the entity paying money ultimately received by a physician, clarification of the Phase I regulations is needed so that many of the compensation arrangements excluded from the definition of indirect compensation arrangements may be protected.

b. Remuneration.—In the Phase I regulations, CMS modified the definition of the term "remuneration" to exclude the furnishing of items, devices, or supplies that are used solely to collect, transport, process, or store specimens for the entity furnishing the items, devices, or supplies or that are used solely to order or communicate the results of tests or procedures for the entity.⁷⁸ If an item can be used for anything other than these purposes, the item thus constitutes remuneration and thereby gives rise to a prohibition under the Stark Law.

c. Referrals.—The term "referral" is worded broadly to include most requests by a physician for a DHS or a service that includes a DHS, including certifying or recertifying the need for such a service as well as services furnished by or under the supervision of a consultative physician, and including written, oral, or electronic referrals. This term also includes the establishment of a plan of care by a physician that includes the provision of a DHS.

Under the Phase I regulations, an exception to the definition of "referral"

72. *Id.*

73. *Id.* § 411.354(b)-(c).

74. *Id.* § 411.354(b)(5)(I)(B).

75. 66 Fed. Reg. 856, 865 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 424).

76. 42 C.F.R. § 411.354(c)(2) (2002).

77. *Id.*

78. *Id.* § 411.351.

provides that self-referrals personally performed are not referrals for purposes of the Stark Law prohibitions.⁷⁹ Further, a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services, by a radiologist for diagnostic radiology services, or by a radiation oncologist for radiation therapy, is not deemed to be a referral if such request results from a consultation initiated by another physician and such tests or services are furnished by or under the supervision of such pathologist, radiologist, or radiation oncologist.⁸⁰

“Consultation” is defined in the Phase I regulations as a professional service furnished to a patient by a physician that meets three conditions. First, the physician’s opinion or advice regarding evaluation and/or management of the specific medical problem must be requested by another physician. Second, the request and need for the consultation must be documented in the patient’s medical record. Third, after the consultation is provided, the physician must prepare a written report of his or her findings and the report must be provided to the physician who requested the consultation. In addition, for radiation therapy services provided by a radiation oncologist, a course of radiation treatments over a period of time will be considered to be pursuant to a consultation, provided the radiation oncologist communicates with the referring physician on a regular basis about the patient’s course of treatment and progress.⁸¹

d. Volume or value of referrals and other business generated standards.— Compensation (including time-based or per unit of service-based compensation) will be deemed not to take into account “the volume or value of referrals” if the compensation is fair market value for services or items actually provided and does not vary during the course of the compensation agreement in any manner that takes into account referrals of DHS.⁸² Similarly, compensation (including time-based or per unit of service-based compensation) will be deemed to not take into account “other business generated between the parties” so long as the compensation is fair market value and does not vary during the term of the agreement in any manner that takes into account referrals or other business generated by the referring physician, including private pay health care business.⁸³

Under the Phase I regulations, CMS made it clear that compensation paid under a per-click lease arrangement will be considered “set in advance” if a time-based or per unit of service-based amount is stated in the initial agreement between the parties in sufficient detail so it can be objectively verified.⁸⁴ Where a per-click payment is set at fair market value and does not change during the term of the lease, the compensation under the lease will be considered “set in advance.” Consequently, such an arrangement may satisfy an exception to the

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* § 411.354(d)(2).

83. *Id.* § 411.354(d)(3).

84. *Id.* § 411.354(d)(1); *see* 66 Fed. Reg. 855, 866-67, 876-78 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 412).

Stark Law, such as the rental of equipment or fair market value exception, so long as the other elements of the exception are satisfied.

e. General requirement of fair market value.—Fair market value is discussed at length in the Phase I regulations. The burden of proving “fairness” is on the parties to the arrangement. Although no single approach is appropriate for each situation and the amount of documentation that will be sufficient to confirm fair market value will vary with the facts of each arrangement, CMS made the following suggestions in its preamble to the Phase I regulations:

- obtain good faith, written assurances as to fair market value from the party paying or receiving the compensation (not a determinative assurance);
- obtain a list of comparable and contemporaneous lease arrangements;
- obtain an appraisal from a qualified independent valuation expert;
- obtain documentation of similar public transactions, where available, or similar public transactions involving comparable parties in similar areas, where local comparable transactions are unavailable;
- obtain documentation of cost plus a reasonable rate of return on investment on leases of comparable medical equipment from disinterested lessors;
- obtain pricing lists for similar equipment;
- local comparable transactions between parties in a position to refer business between them are less compelling than where no referral relationship exists; and
- internally-generated fair market value surveys or comparisons are less compelling than external independent information.⁸⁵

The term “fair market value” means “the value in arm’s length transactions, consistent with the general market value.”⁸⁶ “General market value” means “the price that an asset would bring, as the result of bona fide bargaining between well-informed buyers and sellers” who are not otherwise in a position to generate business for the other party, or, “the compensation that would be included in a service agreement,” as a result of *bona fide* bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, on the date of acquisition of the asset or at the time of the service agreement.⁸⁷

Usually, the fair market value price is the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition, or the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement.⁸⁸

85. 66 Fed. Reg. 856, 944-45 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 424).

86. 42 C.F.R. § 411.351 (2002).

87. See 66 Fed. Reg. 856, 944 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 424).

88. *Id.*

With respect to rentals and leases, “fair market value” means the value of rental property for general commercial purposes (not taking into account its intended use).⁸⁹ In the case of a lease of space, this value may not be adjusted to reflect the additional value a prospective lessee or lessor would attribute to the proximity or convenience to the lessor when the lessor is a potential source of patient referrals to the lessee.⁹⁰ For purposes of this definition, a rental payment does not take into “intended use” if it includes costs incurred by the lessor in developing or upgrading the property or its improvements.⁹¹

f. Physician services exception.—The exception for physician services applies to “incident to” services that are physician services under 42 C.F.R. § 410.20(a) and not to other services.⁹² Such services must be furnished by or under the supervision of another physician who is a member of the referring physician’s group practice or is a physician in the same group practice as the referring physician.⁹³ A “physician in the same group practice” is defined in the Phase I regulations to include employees and independent contractors, thus expanding the scope of the special treatment afforded to group practices.⁹⁴

g. The in-office ancillary services exception.—The in-office ancillary services exception applies to services and a narrowly-tailored list of durable medical equipment (“DME”) items that are furnished personally by the referring physician, a physician who is a member of the same group practice as the referring physician, or an individual who is supervised by the referring physician or by another physician in the group practice.⁹⁵ For purposes of this exception, the supervision must comply with all other applicable Medicare payment and coverage rules for the services.⁹⁶ The supervision requirement was modified in the Phase I regulations to reflect Medicare requirements.

The in-office ancillary service exception requires that services be furnished in the “same building” in which the referring physician furnishes substantial physician services that are unrelated to the furnishing of DHS or in a “centralized building” from which the group practice provides DHS.⁹⁷ The “same building” is defined as one or more structures sharing a common street address.⁹⁸ Exterior spaces, interior parking garages, and mobile units are not part of the “same

89. *Id.*

90. *Id.*

91. *Id.*

92. 42 C.F.R. § 411.355(a) (2002).

93. *Id.*

94. *Id.* § 411.351.

95. *Id.* § 411.355(b).

96. *Id.*

97. *Id.* § 411.355(b)(2). A designated health service is “furnished” for purposes of this exception in the location where the service is actually performed upon a patient or where an item is dispensed to a patient in a manner that is sufficient to meet the applicable Medicare payment and coverage rules.

98. *Id.* § 411.351; *see* 66 Fed. Reg. 856, 952 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 424).

building.”⁹⁹ This definition allows for sharing arrangements for groups working at the same street address. Further, according to CMS commentary in the preamble to the Phase I regulations, if a group practice uses an independent contractor to furnish or supervise services, the service must be in the “same building” as opposed to a “centralized building.”¹⁰⁰ In the case of a referring physician whose principal medical practice consists of treating patients in their private homes, the “same building” requirements of the exception are met if the referring physician (or a qualified person accompanying the physician, such as a nurse or technician) provides the DHS contemporaneously with a physician service that is not a DHS provided by the referring physician to the patient in the patient’s private home.¹⁰¹ A “private home” does not include a nursing, long-term care, or other facility or institution.¹⁰²

The term “centralized building” is defined in the Phase I regulations as all or part of a building, including a mobile unit, that is owned or leased on a full-time basis, and is used exclusively by the group practice.¹⁰³ Shared facilities are not centralized buildings, though a group may provide services to other providers (e.g., purchased diagnostic tests) from within its centralized building.¹⁰⁴ Further, a group may have more than one centralized building.¹⁰⁵

In-office ancillary services must be billed by the physician performing or supervising the service, the performing or supervising physician’s group practice, an entity that is wholly owned by the performing or supervising physician (or by that physician’s group practice), or an independent third party billing company acting on behalf of one of the foregoing.¹⁰⁶ For purposes of this requirement, a group practice may have, and bill under, more than one Medicare billing number, subject to any applicable Medicare program restrictions.¹⁰⁷

h. Group practice definition.—The physician services and in-office ancillary service exceptions contemplate a physician group practice situation, although it is wrong to say that there exists a “group practice” exception under Stark II. A physician group must first qualify as a “group practice” as defined under the law, and then it may be eligible to meet the above exceptions.

Under Stark II, the term “group practice” means a physician practice organized as a single legal entity with at least two physicians who are “members of the group” (whether employees or direct or indirect owners).¹⁰⁸ Non-physicians may own an interest in the group practice, provided that at least two physicians also own an interest in the group. Each member of a group practice

99. 42 C.F.R. 411.351 (2002).

100. 66 Fed. Reg. 866, 887 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 424).

101. 42 C.F.R. § 411.355(b)(6) (2002).

102. *Id.*

103. *Id.* § 411.351.

104. *Id.*

105. *Id.*

106. *Id.* § 411.355(b)(3).

107. *Id.*

108. *Id.* § 411.352(a), (b).

“must furnish substantially the full range of patient care services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment, through the joint use of the group’s shared office space, facilities, equipment, and personnel.”¹⁰⁹

Members of the group must also furnish at least seventy-five percent of their total patient care services through the group, and these services must be billed as receipts of the group under a billing number assigned to the group.¹¹⁰ In addition, “members of the group must personally conduct no less than [seventy-five] percent of the physician-patient encounters of the group practice.”¹¹¹ This requirement effectively limits the extent to which independent contractors may participate in a group practice.

To qualify as a group practice, the practice’s overhead expenses and income must be distributed according to predetermined methods, though the distribution mechanism may be modified prospectively from time to time.¹¹² A group practice must also be a “unified business,” with a “centralized decision-making body”; “consolidated billing, accounting, and financial reporting”; and “centralized utilization review.”¹¹³ This requirement is intended to set some “general parameters of integration.”¹¹⁴ As such, some type of “board” and financial integration are necessary.

In addition, no member of the group practice may be compensated in a manner that reflects the volume or value of referrals by the group member except through certain productivity bonuses and profit shares.¹¹⁵ A group practice member may receive a share of the group’s overall profits, or a productivity bonus based on that physician’s personally performed services, provided that the calculation of such payment does not reflect in any manner the volume or value of referrals of DHS by the physician.¹¹⁶ Supporting documentation verifying the method used to calculate the profit shares or productivity bonus and the resulting amount of compensation must be made available to the secretary upon request.¹¹⁷

A group practice must select an appropriate allocation mechanism for purposes of DHS profit distribution. Several such allocation options are presented in the Phase I regulations.¹¹⁸ Methods other than those presented in the regulations, such as ownership or seniority, are acceptable. Regardless, such other methods must be reasonable, objectively verifiable, and indirectly related to referrals, and a group should maintain objective documentation of

109. *Id.* § 411.352(c).

110. *Id.* § 411.352(d).

111. *Id.* § 411.352(h).

112. *Id.* § 411.352(e).

113. *Id.* § 411.352(f)(1).

114. 66 Fed. Reg. 856, 906 (Jan. 4, 2001) (to be codified at 42 C.F.R. pt. 411, 424).

115. 42 C.F.R. § 411.352(h) (2002).

116. *Id.* § 411.352(i).

117. *See id.* § 411.352(i)(4).

118. *See id.* § 411.352(i)(3).

compliance.¹¹⁹

A potentially problematic issue is found in commentary to the final rule wherein CMS states that it believes that “a compensation structure does not directly take into account the volume or value of referrals if there is no direct correlation between the total amount of a physician’s compensation and the volume or value of the physician’s DHS referrals (regardless of whether the services are personally performed).”¹²⁰ If the services are personally performed, however, there is no referral within the meaning of the Stark Law.¹²¹ CMS should clarify this commentary to reflect that there be no direct correlation between volume or value of referrals.

i. Prepaid plans.—Phase I provides a new exception for services furnished by a specified federally qualified HMO or prepaid health plan that has a contract with Medicare.¹²² This exception does not include “services provided to enrollees in any other plan or line of business offered or administered by the same organization.”¹²³ An additional regulation that would extend this protection to Medicaid prepaid plans is not yet final.¹²⁴

j. Academic medical centers.—CMS was persuaded that the peculiarities of the academic setting warranted a special exception for DHS furnished by academic medical centers. Thus, an exception to the Stark Law for any financial relationship applies where a referring physician is a bona fide employee of an academic medical center on a full-time or substantial part-time basis.¹²⁵ The physician may also be employed by or under contract with a component of an academic medical center, including an affiliated medical school, faculty practice plan, hospital, teaching facility, institution of higher education, or departmental professional corporation.¹²⁶

In addition, this exception requires that the physician be licensed to practice medicine in the State, have a bona fide faculty appointment at the affiliated medical school, and provide substantial academic or clinical teaching services, compensated as part of the employment relationship.¹²⁷ This exception also includes requirements that the physician’s compensation be set in advance in an amount not greater than the fair market value of the services provided and be determined in a manner that does not reflect the volume or value of any referrals or other business generated by the referring physician within the academic medical center.¹²⁸

119. See *id.* § 411.352(i)(2)(iv).

120. See 66 Fed. Reg. 856, 908 (Jan. 4, 2001).

121. See *supra* note 70 and accompanying text.

122. See 42 C.F.R. § 411.355(c) (2002).

123. See *id.*

124. See 66 Fed. Reg. at 911 (referring to a proposed regulation to be codified at 42 C.F.R. § 435.1012).

125. See 42 C.F.R. § 411.355(e).

126. See *id.*

127. See *id.*

128. See *id.*

k. Fair market value compensation arrangements.—Another new exception created by the Phase I regulations provides that certain fair market value compensation arrangements are not proscribed financial relationships under the Stark Law.¹²⁹ This exception applies to an arrangement between an entity and a physician or any group of physicians (whether or not a “group practice” within the meaning of the Stark Law) for the provision of items or services by the physician or group practice to the entity, if the arrangement is set forth in an agreement that meets the following conditions:

(1) It is in writing, signed by the parties, and covers only identifiable items or services, all of which are specified in the agreement.

(2) It specifies the timeframe for the arrangement, which can be for any period of time and contain a termination clause, provided the parties enter into only one arrangement for the same items or services during the course of a year. An arrangement made for less than 1 year may be renewed any number of times if the terms of the arrangement and the compensation for the same items or services do not change.

(3) It specifies the compensation that will be provided under the arrangement. The compensation must be set in advance, be consistent with fair market value, and not be determined in a manner that takes into account the volume or value of any referrals or any other business generated by the referring physician.

(4) It involves a transaction that is commercially reasonable (taking into account the nature and scope of the transaction) and furthers the legitimate business purposes of the parties.

(5) It meets a safe harbor under the anti-kickback statute in [42 C.F.R.] §1001.952, has been approved by the OIG under a favorable advisory opinion issued in accordance with [42 C.F.R. part] 1008, or does not violate the anti-kickback provisions in section 1128B(b) of the Act.

(6) The services to be performed under the arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates a State or Federal law.¹³⁰

CMS has stated that this exception may be used even if another exception potentially applies. Thus, as this exception has no term requirement, it has advantages over several other similar exceptions that are otherwise burdened with a term limitation (e.g., the personal services arrangement exception¹³¹).

l. Non-monetary compensation up to \$300.—Compensation from an entity in the form of items or services (not including cash or cash equivalents) that does not exceed an aggregate of \$300 per year “is not a financial relationship within the meaning of the Stark Law” if all of the following conditions are satisfied:

129. See 42 C.F.R. § 411.357(l) (2002).

130. *Id.*

131. See 42 C.F.R. § 411.357(d).

- (1) The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician.
- (2) The compensation may not be solicited by the physician or the physician's practice (including employees and staff members).
- (3) The compensation arrangement does not violate the Federal anti-kickback statute, section 1128B(b) of the Act.¹³²

m. Definitions of the designated health services.—In the Phase I regulations, CMS defined the first four categories of DHS by using CPT and HCPCS codes attached to the regulations with updates posted on the CMS web site. These categories include: (1) clinical laboratory services; (2) physical therapy services, occupational therapy services, and speech-language pathology services; (3) radiology and certain other imaging services; and (4) radiation therapy services and supplies. Modifications to the list occurred on November 1, 2001,¹³³ and April 26, 2002.¹³⁴ In commentary to the Phase I regulations, CMS stated that it has included the professional component in each case in which a professional component is included in the code representing a DHS.¹³⁵ However, it further stated that “[a]s a practical matter the professional component of many services will be excluded from the definition of a referral as services personally performed by the referring physician.”¹³⁶

The Phase I regulations clarified that DHS “means only DHS payable, in whole or in part, by Medicare.”¹³⁷ (The Medicaid aspect will be addressed in Phase II.) Further, DHS do not include services that are reimbursed by Medicare as part of a composite rate (e.g., ambulatory surgical center services or skilled nursing facility Part A payments) unless the DHS themselves reflect a composite rate (e.g., inpatient hospital services).¹³⁸ However, entities that perform consolidated billing (e.g., SNF Part B) will be deemed to provide DHS.¹³⁹

n. Remuneration and the exceptions in section 1877(h)(1)(C) of the Act.—On November 22, 2002, CMS published a final rule extending the effective date of the last sentence of section 411.354(d)(1).¹⁴⁰ Consequently, the rule reflected

132. *Id.* § 411.357(k).

133. Medicare Program; Revisions to Payment Policies and Five-Year Review of and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 2002, 66 Fed. Reg. 55426, 55311 (Nov. 1, 2001).

134. Medicare Program; Revisions to Payment Policies and Five-Year Review of and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 2002; Correction, 67 Fed. Reg. 20681-87 (Apr. 26, 2002).

135. *See* 66 Fed. Reg. 856, 924 (Jan. 4, 2001).

136. *Id.*

137. *See* 42 C.F.R. § 411.351 (2002).

138. *Id.*

139. *See* 66 Fed. Reg. 856, 923 (Jan. 4, 2001).

140. Extension of Partial Delay of Effective Date, 67 Fed. Reg. 70322 (Nov. 22, 2002). The last sentence of Sec. 411.354(d)(1) reads as follows:

in the last sentence of section 411.354(d)(1), which would have become effective January 6, 2003, will not become effective until July 7, 2003.¹⁴¹ Section 411.354(d)(1) of the Stark Law relates to percentage compensation arrangements for physicians. This extension of the one-year delay in the effective date of that sentence will give CMS additional time to reconsider the definition of compensation that is “set in advance” as it relates to percentage compensation methodologies in order to avoid unnecessarily disrupting existing contractual arrangements for physician services.¹⁴² CMS expects a future final rule with comment period, entitled “Medicare Program: Physicians’ Referrals to Health Care Entities With Which They Have Financial Relationships” (Phase II), to further address this issue prior to the July 7, 2003 effective date.¹⁴³

CMS received numerous comments regarding the Phase I regulations indicating that hospitals, academic medical centers, medical foundations and other health care entities commonly pay physicians for their professional services using a formula that takes into account a percentage of a fluctuating or indeterminate measure (for example, revenues billed or collected for physician services).¹⁴⁴

Several commentators pointed out that this aspect of the [Phase I regulations], which is applicable to academic medical centers and medical foundations (among others), is inconsistent with the compensation methods permitted under the statute for many physician group practices and employed physicians (that is, neither section 1877(h)(4)(B)(i) of the Act nor section 1877(e)(2) of the Act contains the “set in advance” requirement).¹⁴⁵

Recognizing that hospitals, academic medical centers, medical foundations and other health care entities would have to restructure or renegotiate thousands of physician contracts to comply with the language in section 411.354(d)(1) regarding percentage compensation arrangements, CMS has prescribed this one-year delay of the effective date in order to reconsider the definition of compensation that is “set in advance” as it relates to percentage compensation

Percentage compensation arrangements do not constitute compensation that is “set in advance” in which the percentage compensation is based on fluctuating or indeterminate measures or in which the arrangement results in the seller receiving different payment amounts for the same service from the same purchaser.

141. Section 411.354(d)(1) was promulgated in the final rule entitled “Medicare and Medicaid Programs; Physicians’ Referrals to Health Care Entities With Which They Have Financial Relationships,” published in the Federal Register on January 4, 2001 (66 Fed. Reg. 856). A one-year delay of the effective date of the last sentence in § 411.354(d)(1) was published in the Federal Register on December 3, 2001 (66 Fed. Reg. 60154). This final rule further delays the effective date until July 7, 2003.

142. 67 Fed. Reg. at 70323.

143. *Id.*

144. *See id.*

145. *Id.*

methodologies.¹⁴⁶

C. Federal Fraud and Abuse Anti-Kickback Statute: Ambulance Replenishing Safe Harbor

On December 4, 2001, the Department of Health and Human Services Office of Inspector General ("OIG") issued a final rule¹⁴⁷ establishing a safe harbor exception to the Fraud and Abuse Anti-Kickback Statute¹⁴⁸ for ambulance restocking arrangements ("Safe Harbor"). The Safe Harbor, which became effective January 3, 2002, protects certain arrangements involving hospitals or other receiving facilities¹⁴⁹ that replenish drugs and medical supplies (including linens) used by ambulance providers¹⁵⁰ (and first responders) when transporting patients to such hospitals or receiving facilities. The Safe Harbor does not protect arrangements for the general stocking of the ambulance inventories, but only the gifting or transfer of drugs and supplies that replace comparable drugs and supplies that are administered by the ambulance provider to a patient before the patient is delivered to the receiving facility. The OIG's stated goal is to provide "safe harbor protection for the vast majority of ambulance restocking arrangements that further the important mission of ensuring that pre-hospital emergency medical services are timely, effective and efficient."¹⁵¹

Ambulance restocking arrangements implicate the Anti-Kickback Statute because the receiving facility provides something of value to the ambulance provider, who is a potential referral source of federal healthcare business.¹⁵² However, properly structured restocking arrangements can be lawful and allow for ambulances to be ready for emergency use at all times.¹⁵³

146. *Id.*

147. Ambulance Replenishing Safe Harbor Under the Anti-Kickback Statute, 66 Fed. Reg. 62979 (Dec. 4, 2001) (codified at 42 C.F.R. §1001.952(v)).

148. 42 U.S.C. §§1320a-7b(b) (1994 & Supp. II 1996).

149. References to "receiving facilities" in the Safe Harbor include hospitals, urgent care clinics or community health clinics that provide emergency services. *See* 42 C.F.R. § 1001.952(v).

150. Unless otherwise specified, the term "ambulance providers" as used in this article and the Safe Harbor refers to independent ambulance suppliers and hospital-based providers, including under-arrangements providers. *See id.*

151. Ambulance Replenishing Safe Harbor Under the Anti-Kickback Statute, 66 Fed. Reg. at 62980.

152. *See id.*

153. *Id.* While the OIG issued a non-favorable advisory opinion regarding an ambulance restocking arrangement in 1997 (OIG Advisory Opinion No. 97-6 (October 8, 1997)), it explained that the particular arrangement that was the subject of that advisory opinion presented an "unusual set of facts." *Id.* The OIG has since issued several favorable opinions approving restocking arrangements that it believed were more representative of typical restocking arrangements. *Id.*; *see* OIG Advisory Opinions Nos. 98-7 (1998); 98-13 (1998); 98-14 (1998); and 00-09 (2000). In the comments to the final rule, the OIG indicated that some hospitals have used the unfavorable 97-6 opinion as a pretext for the hospitals' decisions to terminate, or decline to participate in, restocking

The Safe Harbor protects three categories of replenishing: general restocking, fair market value restocking, and government-mandated restocking.¹⁵⁴ An arrangement needs only to satisfy the conditions of one of these categories to be protected by the Safe Harbor.¹⁵⁵ In furtherance of the goal to enhance emergency services, the ambulance that is replenished must be used to provide an average of three emergency ambulance services per week, as measured over a reasonable period of time, to qualify for Safe Harbor protection.¹⁵⁶ In addition, the regulation includes two sets of conditions: one set that is generally applicable to all three restocking categories,¹⁵⁷ and another set that includes conditions that are specific to each of these categories.¹⁵⁸ Therefore, to qualify for the Safe Harbor protection, a restocking arrangement must meet all of the conditions set forth in the first set of conditions and all of the conditions applying to any one category in the second set of conditions.¹⁵⁹

The general conditions that are applicable to all restocking arrangements include the following: appropriate billing of federal health care programs (e.g., no duplicate billing and billing must be consistent with all applicable program payment and coverage rules and regulations); documentation of the restocking, which is maintained for a period of five years (the pre-hospital trip sheet or patient encounter form may be sufficient to satisfy this requirement); the restocking arrangement must not be conditioned on, or otherwise take into account, the volume or value of any referrals or other business generated between the parties for which payment may be made in whole or in part by a federal health care program; and such replenishing arrangement must otherwise comply with all other applicable laws.¹⁶⁰

1. *General Replenishing.*—The Safe Harbor for general replenishing requires the receiving facility to replenish medical supplies or drugs on an equal basis for all ambulance providers that bring patients to the receiving facility in any one of the following categories: 1) all ambulance providers; 2) all non-profit and governmental providers; or 3) all non-charging providers, which are typically

arrangements in order to avoid the negative publicity related to such decisions. Ambulance Replenishing Safe Harbor Under the Anti-Kickback Statute, 66 Fed. Reg. at 62982.

154. *Id.* at 62981 (codified at C.F.R. §1001.952(v)(3)).

155. *Id.*

156. *See id.* at 62983. Although replenishing ambulance providers that do not provide emergency services of this frequency is outside the scope of this Safe Harbor, it does not mean that such arrangements are per se illegal. Rather, such arrangements must be analyzed for compliance with the Anti-Kickback Statute on a case-by-case basis. *Id.*

157. 42 C.F.R. §1001.952(v)(2).

158. *Id.* §1001.952(v)(3).

159. *See* Ambulance Replenishing Safe Harbor Under the Anti-Kickback Statute, 66 Fed. Reg. at 62981.

160. *Id.* at 62981. Other applicable laws include, for example, the Prescription Drug Marketing Act of 1987 (“PDMA”), Pub. L. No. 100-293, 102 Stat. 95 (1988), which governs the resale of prescription drugs. Therefore, the resale of drugs does not fall within the scope of this Safe Harbor.

volunteers and municipal providers.¹⁶¹ A receiving facility may offer replenishing to one or more of the categories and may offer different replenishing arrangements to different categories, so long as the replenishing is conducted uniformly within each category.¹⁶² Further, the replenishing arrangement must be conducted in an open and public manner.¹⁶³

2. *Fair Market Value Replenishing*.—In addition to the general conditions, this category requires the ambulance provider to pay the receiving facility fair market value, based on an arms-length transaction, for replenished medical supplies, and, if payment is not made at the same time as the replenishing of the medical supplies, the receiving facility and the ambulance provider must make commercially reasonable payment arrangements in advance.¹⁶⁴

3. *Government Mandated Replenishing*.—This category protects replenishing arrangements that are undertaken in accordance with a state or local statute, ordinance, regulation or binding protocol that requires hospitals or receiving facilities in the area subject to such requirement to replenish ambulances that deliver patients to the hospital with drugs or medical supplies (including linens) that are used during the transport of that patient.¹⁶⁵

Since the Safe Harbor became effective, the OIG has issued two favorable advisory opinions interpreting the applicability of the Safe Harbor to replenishing arrangements, finding that both arrangements satisfied the criteria for “general replenishing” under the Safe Harbor.¹⁶⁶

III. TAXATION

1. *St. David's Health Care System, Inc. v. United States*.—Tax-exempt hospitals gained some potential flexibility in the area of joint ventures with for-profit entities with *St. David's Health Care System, Inc. v. United States*.¹⁶⁷ In that case, St. David's Health Care System (“St. David's”), an entity exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “Code”),¹⁶⁸ sued the Internal Revenue Service (“IRS”) for a refund of federal income taxes paid after the IRS revoked its tax-exempt status.¹⁶⁹ The IRS had made the revocation alleging that St. David's had failed the operational test for Section 501(c)(3) status, after it had entered into a joint venture limited partnership with a for-profit subsidiary of HCA (“HCA”), a

161. 42 C.F.R. §1001.952(v)(3)(i).

162. *Id.*

163. *See id.* §1001.952(v)(3)(i)(A)(3)(B)(1)(i) and (ii) for the conditions that must be satisfied to qualify as conducting the replenishing arrangement in an “open and public manner.”

164. *Id.* §1001.952(v)(3)(ii)(B).

165. *Id.* §1001.952(v)(3)(iii).

166. OIG Advisory Opinion Nos. 02-2 & 02-3 (Apr. 4, 2002).

167. 2002 WL 1335230 (W.D. Tex. June 7, 2002).

168. I.R.C. § 501(c)(3) (2002).

169. *St. David's Health Care Sys.*, 2002 WL 1335230 at *1.

national for-profit health care system.¹⁷⁰ Pursuant to the terms of the partnership, St. David's had ownership interests in the partnership totaling 45.9% at the time of the court's decision.¹⁷¹ The partnership was governed by a Board of Governors, in which representation was evenly split between St. David's and HCA.¹⁷² Decisions by the Board of Governors were implemented by a management entity, which was obligated to ensure that the partnership was operated consistent with the community benefit standard of Section 501(c)(3) of the Code.¹⁷³

On summary judgment, the court reversed the determination by the Internal Revenue Service to revoke St. David's tax-exempt status and ordered the refunding of taxes paid by St. David's since the revocation.¹⁷⁴ The court agreed with the IRS that the operational test was at issue,¹⁷⁵ but disagreed with the IRS' contentions that St. David's was not controlled by a community board and that HCA received an impermissible private benefit.¹⁷⁶

The court found, "[A]s a matter of law, the presence of a community board is a point in favor of exemption, but is not an absolute requirement for exemption."¹⁷⁷ The court went on to say that, even if a community board was a requirement for exemption, St. David's met that requirement with the structure of its Board of Governors.¹⁷⁸ The court offered a broader definition of the community board standard than that urged by the IRS, stating, "The purpose of the community board is to ensure that the community's interests are given precedence over any private interests. Thus, if a board is structured to ensure such protection, it is clearly a community board."¹⁷⁹

The court also found that there was no impermissible private benefit that accrued to HCA. Citing the recent *Redlands* case, the court emphasized that private benefit hinges on whether the joint venture has an "*obligation to put*

170. *Id.*

171. *Id.*

172. *Id.* at *5.

173. See Linda S. Moroney & Joseph C. Mandarino, *The St. David's Decision: Breathing Life into Joint Ventures?*, HEALTH LAW. NEWS, at 9 (Oct. 2002) (citing facts not referenced by the court's decision, but by a Technical Advice Memorandum issued by the Internal Revenue Service).

174. *St. David's Health Care System*, 2002 WL 1335230 at *8.

175. *Id.* at *5.

176. *Id.* at *8.

177. *Id.* at *5.

178. *Id.* at *7. The court noted that four factors favored a finding that the partnership Board is a community board: (1) the partnership contract requires that all hospitals owned by the partnership operate in accord with the community benefit standard; (2) St. David's has the unilateral right to dissolve the partnership should the hospital fail to meet that standard; (3) the chairman of the Board is appointed by St. David's, giving St. David's control over the agenda of the Board; and (4) the day-to-day operations of the partnership are disproportionately impacted by St. David's because of its power to unilaterally remove the partnership's Chief Executive Officer. *Id.*

179. *Id.* at *6.

charitable purposes ahead of profit-making objectives."¹⁸⁰ In the partnership at issue, St. David's maintained enough controls to ensure that its charitable purposes were placed ahead of the profit-making objectives of the partnership.¹⁸¹ In spite of the fact that Board representation was fifty-fifty between St. David's and HCA, and in spite of the fact that St. David's had less than a fifty percent interest in the partnership, the court concluded that "it is difficult to imagine a corporate structure more protective of an organization's charitable purpose than the one at issue in this case."¹⁸²

The *St. David's* decision appears to allow for tax-exempt health care entities to have increased freedom as they structure joint ventures with for-profit entities, with less incidents of control, so long as certain incidents of control are maintained and the commitment to charity care supercedes the joint venture's profit-making objectives. Because this is a district court case, however, it should be noted that its ultimate impact will depend on whether its reasoning is more widely adopted by other courts.

2. *Caracci v. Commissioner of Internal Revenue*.—The United States Tax Court in May of 2002 decided *Caracci*, the first case to interpret substantively the intermediate sanctions provisions of Section 4958 of the Code.¹⁸³ The *Caracci* case offers guidance as to the appropriate role of intermediate sanctions as an enforcement tool for the IRS against activities that are inconsistent with an entity's tax-exempt purposes. In that case, the Caracci family owned three different home health care agencies, each of which was exempt from federal income taxation under Section 501(c)(3) of the Code.¹⁸⁴ In 1995, the Caracci family effected the transfer of substantially all of the assets of each of these tax-exempt entities, subject to liabilities, to three newly formed S-corporations, which were thereafter operated as for-profit entities.¹⁸⁵ The only consideration for these transfers was the corresponding assumption of liabilities by each of the S-corporation transferees.¹⁸⁶ The Caracci family determined, based upon appraisals performed on the tax-exempt entities, that the liabilities assumed exceeded the value of the assets transferred, and that, therefore, the transfer was made at or above fair market value.¹⁸⁷

The IRS disagreed, finding that the assets of the tax-exempt entities far exceeded the value of the corresponding liabilities and that the transactions were therefore inconsistent with fair market value.¹⁸⁸ This resulted in an "excess benefits transaction," where a "disqualified person" under Section 4958 of the

180. *Id.* at *8 (quoting *Redlands Surgical Servs. v. Comm'r*, 113 T.C. 47, 78 (1999)).

181. *Id.*

182. *Id.*

183. *Caracci v. Comm'r of Internal Revenue*, 118 T.C. 379 (2002).

184. *Id.* at 379.

185. *Id.*

186. *Id.* at 379-80.

187. *Id.*

188. *Id.* at 380.

Code received an “excess benefit” from a tax-exempt entity.¹⁸⁹ The IRS imposed an excise penalty tax respecting the transaction as an intermediate sanction.¹⁹⁰ In addition, the IRS revoked the tax-exempt status of each of the former home health care agencies.¹⁹¹

The court upheld the imposition of intermediate sanctions by the IRS.¹⁹² After a lengthy discussion, the court found that the value of the assets transferred did exceed the value of the liabilities assumed, rendering the transaction inconsistent with fair market value.¹⁹³ The court declined, however, to revoke the tax-exempt status of the former home health care agencies, finding that the intermediate sanctions penalty was sufficient.¹⁹⁴ It was here that the court gave interpretive guidance to the intermediate sanctions provisions. Quoting the legislative history of Section 4958, the court stated, “In general, the intermediate sanctions are the sole sanction imposed in those cases in which the excess benefit does not rise to a level where it calls into question whether, on the whole, the organization functions as a charitable or other tax-exempt organization.”¹⁹⁵ The court reasoned that the intermediate sanctions provisions were designed as an independent penalty and should only be accompanied by revocation of tax-exempt status in the most egregious of cases.¹⁹⁶ Because the tax-exempt entities at issue had been dormant since the transaction, the court was unable to determine whether they were functioning inconsistently with their charitable or other tax-exempt purposes, and on that basis refused to revoke their tax-exempt statuses.¹⁹⁷

3. *Griffin v. Department of Local Government Finance*.—The Hospital Care for the Indigent (“HCI”) tax survived scrutiny as a possibly unconstitutional taxation of property under article 10, section 1 of the Indiana Constitution.¹⁹⁸ The HCI tax is assessed by each Indiana county on property located within it, and is used to provide cost-free emergency medical care to indigent patients who do

189. *Id.* Section 4958 provides for a tax equal to twenty-five percent of the excess benefit on the disqualified person. I.R.C. § 4958(a)(1) (2003). The Code defines an “excess benefit transaction” as “any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit.” *Id.* § 4958(c)(1)(A). The Code defines a “disqualified person” as a person “in a position to exercise substantial influence over the affairs of the organization” or such person’s family member. *Id.* § 4958(f)(1).

190. *Caracci*, 118 T.C. at 380.

191. *Id.*

192. *Id.*

193. *Id.* at 415.

194. *Id.* at 416-18.

195. *Id.* at 417 (quoting H.R. REP. NO. 104-506, at 59 n.15 (1996), 1996-3 C.B. at 107).

196. *Id.*

197. *Id.* at 417-18.

198. *Griffin v. Dep’t Local Gov’t Fin.*, 765 N.E.2d 716 (Ind. Tax Ct. 2002), *overruled by* *Dep’t of Local Gov’t Fin. v. Griffin*, 784 N.E.2d 448 (Ind. 2003).

not qualify for Medicaid.¹⁹⁹ The HCI fund is used to pay millions of dollars to providers in Indiana that provide indigent care.²⁰⁰ For the last ten years, the HCI program has been part of a federal Medicare matching program that is designed to bring up to \$45 million of additional funds into the HCI program.²⁰¹ The HCI tax rate, however, is not uniform across the state, but instead varies from county to county.²⁰²

In *Griffin*, the Indiana Tax Court addressed the constitutionality of the HCI tax. In spite of the government's argument to the contrary, the Indiana Tax Court ruled that the HCI tax is not a local tax, but is instead a state tax.²⁰³ In doing so, the court subjected the tax to the strictures of the Indiana constitutional requirement in article 10, section 1, which mandates that state taxes be applied in a uniform and equal manner.²⁰⁴ The court found that the HCI tax fails this requirement, and is therefore unconstitutional.²⁰⁵ In a subsequent hearing, however, the court declined to enjoin collection of the tax while the appeal is being pursued.²⁰⁶ On September 19, 2002, the government's appeal was transferred to the Indiana Supreme Court and the Indiana Tax Court's opinion was vacated.²⁰⁷ On March 5, 2003, the Indiana Supreme Court reversed the Tax Court's decision, finding the HCI tax constitutional.²⁰⁸ Chief Justice Shepard, speaking for a majority of four justices, stated that taxation is a matter in which the courts should give deference to the legislature.²⁰⁹ In upholding the constitutionality of the HCI tax, he stated that article 10 requires uniformity within a particular taxing district, and not necessarily across the entire state.²¹⁰ "In light of the historic rule of local finance for local service in this field," stated Chief Justice Shepard, "we are not persuaded that the Constitution prohibits the legislature from matching burden with benefit."²¹¹

IV. PROVIDER LIABILITY

1. *St. Anthony Hospital v. United State Department of Health and Human Services*.—In *St. Anthony Hospital v. DHHS*, the United States Court of Appeals for the Tenth Circuit imposed a civil monetary penalty upon a hospital for

199. *Id.* at 719-20.

200. *Id.* at 721.

201. *Id.*

202. *Id.* at 720.

203. *Id.* at 722.

204. *Id.* at 722-23.

205. *Id.* at 723-24.

206. *Griffin v. Dep't Local Gov't Fin.*, 770 N.E.2d 957 (Ind. Tax Ct. 2002).

207. *Griffin v. Dep't Local Gov't Fin.*, 783 N.E.2d 696 (Ind. 2002). Transfer granted to Indiana Supreme Court September 19, 2002.

208. *Dep't of Local Gov't Fin. v. Griffin*, 784 N.E.2d 448 (Ind. 2003).

209. *Id.* at 452.

210. *Id.* at 455-56.

211. *Id.* at 457.

violation of the Emergency Medical Treatment and Labor Act's ("EMTALA") reverse dumping provision.²¹² In that case, a victim of an automobile accident was brought to a small rural hospital ("Shawnee").²¹³ When it was determined that Shawnee was unable to treat the victim, an attempt was made to transfer him to a larger urban hospital.²¹⁴ When that hospital refused to accept the transfer, an attempt was made to transfer him to St. Anthony Hospital ("St. Anthony").²¹⁵ St. Anthony refused the transfer, arguing that the victim should be cared for by the initial transferee hospital.²¹⁶

Allegations of EMTALA violations were initially brought against Shawnee, and the case was referred to a peer review organization.²¹⁷ Although Shawnee was afforded the opportunity to participate in the peer review process, no such opportunity was given to St. Anthony.²¹⁸ A civil monetary penalty was imposed upon St. Anthony for "reverse dumping," a term used to describe an impermissible refusal by a hospital to accept an EMTALA patient transfer.²¹⁹ The penalty was upheld throughout the administrative process, and St. Anthony appealed to the Tenth Circuit.²²⁰

The court held that, under 42 U.S.C. § 1395dd(d)(3), St. Anthony's was entitled to participate in the peer review process, acknowledging that peer review provides expert medical opinion "regarding whether the individual involved had an emergency medical condition, whether the individual's emergency medical condition was stabilized, whether the individual was transferred appropriately, and whether there were any medical utilization or quality of care issues involved in the case."²²¹ In spite of this error, the court found that St. Anthony was not prejudiced by its lack of participation in the peer review process. The court rejected St. Anthony's argument that its due process rights were violated, noting that "[t]he duty of establishing prejudice rests upon St. Anthony; . . . it falls far short of meeting its burden, arguing merely that its request for PRO review was denied and that its statutory and due process rights were violated."²²²

The *St. Anthony* case emphasizes the burden that rests upon the defendant hospital in administrative actions arising under EMTALA. Although the administrative process includes a number of safeguards that are intended to ensure the presence of Fifth Amendment Due Process, the failure of one of those safeguards does not necessarily prejudice the government's claim. The defendant hospital bears the burden of proving that such error was prejudicial

212. 309 F.3d 680, 686 (10th Cir. 2002).

213. *Id.* at 687.

214. *Id.*

215. *Id.* at 688.

216. *Id.*

217. *Id.*

218. *Id.* at 689.

219. *Id.*

220. *Id.* at 690.

221. *Id.* at 697.

222. *Id.* at 698-99 (citation omitted).

upon the outcome of the action.

2. *Jacobs v. Manhart*.—The Indiana Court of Appeals ruled twice on the constitutionality of occurrence-based statutes of limitations in the area of medical malpractice. The Indiana medical malpractice statute of limitations requires the plaintiff to file her claim within two years of the date of the alleged malpractice.²²³ The Indiana statute is “occurrence-based,” triggering the running of the period with the act by the physician, rather than “discovery-based,” as in some states, where the period begins to run with the discovery of the alleged malpractice by the plaintiff.²²⁴ In *Jacobs v. Manhart*, the court found the statute unconstitutional as applied to medical malpractice claims that were not reasonably discoverable until after the two-year period had expired.²²⁵ In *Jacobs*, the plaintiff filed a malpractice claim twenty-seven months after the alleged malpractice act.²²⁶ This, claimed the defendants, barred the plaintiff’s action.²²⁷

The court acknowledged that the plaintiff discovered her condition prior to the statute’s expiration and that plaintiff’s claim was made after the statute of limitations expired.²²⁸ Nonetheless, the court held that “looking at the totality of the circumstances giving rise to this claim, . . . it was a practical impossibility for Mrs. Manhart to assert her claim before expiration of the limitation period and . . . rigid application of the occurrence-based statute would deny her the meaningful opportunity to pursue her claim.”²²⁹ The court found that the plaintiff’s discovery of the malpractice did not take place until the plaintiff knew “facts that, in the exercise of reasonable diligence, should lead to the discovery of the alleged malpractice and the resulting injury.”²³⁰ In this case, that discovery did not occur with the plaintiff’s initial suspicions; rather, it occurred when a physician confirmed those suspicions.²³¹

3. *Johnson v. Gupta*.—The Indiana Court of Appeals upheld the constitutionality of the occurrence-based statute as applied to a defendant whose alleged malpractice was reasonably discoverable within the two-year period.²³² In that case, the defendant physician performed a surgical procedure on the plaintiff in September 1990.²³³ Following the surgical procedure, the plaintiff experienced medical problems which the physician assured her would subside.²³⁴ The plaintiff claimed that she did not discover the defendant’s malpractice until four years after her operation, when a different physician diagnosed her ailment

223. IND. CODE § 34-18-7-1 (2002).

224. See *Martin v. Richey*, 711 N.E.2d 1273, 1278 (Ind. 1999).

225. 770 N.E.2d 344, 355 (Ind. App. 2002).

226. *Id.* at 347-48.

227. *Id.* at 348.

228. *Id.* at 353.

229. *Id.* at 355.

230. *Id.* at 350.

231. *Id.* at 354.

232. *Johnson v. Gupta*, 762 N.E.2d 1280 (Ind. App. 2002).

233. *Id.*

234. *Id.*

as relating back to that operation, and failed to pursue a malpractice claim until the subsequent physician established a causal link between her symptoms and the alleged act of malpractice.²³⁵ The court refused to allow for a tolling of the statute until the establishment of such a causal link, noting that any judicial exception to the statute is intended to allow for a plaintiff who, with reasonable diligence, would be unable to discover the malpractice.²³⁶ In this case, the court reasoned that the plaintiff's knowledge of her immediate medical problems made the alleged malpractice reasonably discoverable immediately after the surgical procedure.²³⁷

The *Johnson* and *Jacobs* cases illustrate a continued tension between the existing occurrence-based statute of limitations and the judicially imposed discovery-based period. While *Johnson* seems to make clear that the occurrence-based statute is still the law, cases like *Jacobs* remind us that courts are willing to impose a discovery-based standard when justice so requires.

V. LABOR AND EMPLOYMENT CASES

In *Clackamas Gastroenterology Associates v. Wells*, the United States Supreme Court granted Clackamas Gastroenterology Associates, P.C. petition for writ of certiorari and ruled that the common-law element of control is the principal guidepost that should be used to determine whether physician-shareholders in a medical practice constitute employees for purposes of the Americans With Disabilities Act of 1990 ("ADA").²³⁸

Wells, an employee of Clackamas, brought an action against Clackamas alleging unlawful discrimination in violation of the ADA. Clackamas moved for summary judgment, arguing that it did not have fifteen or more employees for the twenty weeks required by the statute and therefore was not a covered entity as defined by the ADA.²³⁹ Wells argued that the physician-shareholders were employees of the professional corporation and that, therefore, the corporation met the minimum employee requirement necessary to be subject to the ADA. The court of appeals found in favor of Wells, holding that the physician-shareholders "actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements."²⁴⁰ As a result of the court's counting the physician-shareholders as employees, Clackamas had enough employees to qualify as a covered entity.

The circuits were split on whether shareholders in a professional corporation constitute employees for purposes of federal employment discrimination laws. In *EEOC v. Dowd & Dowd*, the Seventh Circuit applied an "economic realities"

235. *Id.* at 1282-83.

236. *Id.* at 1283.

237. *Id.*

238. *Clackamas Gastroenterology Assocs. v. Wells*, 123 S. Ct. 1673 (2003).

239. *Wells v. Clackamas Gastroenterology Assocs.*, 271 F.3d 903, 904 (9th Cir. 2001).

240. *Id.* at 906.

test in making its determination and held that shareholders do not constitute employees for purposes of discrimination laws.²⁴¹ The court stated, "[t]he role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation."²⁴² The Ninth Circuit in *Wells*, however, was more persuaded by the Second Circuit's rejection of the "economic realities" test in *Hyland v. New Haven Radiology Associates*.²⁴³ The Second Circuit held that using the professional corporate form "precludes any examination designed to determine whether the entity is in fact a partnership."²⁴⁴ Both the Second and Ninth Circuits reasoned that it was unfair to allow a professional corporation simultaneously to reap the tax and civil liability benefits of having corporate status and yet avoid being covered by the employment anti-discrimination laws by arguing it was a partnership.²⁴⁵

The Supreme Court resolved the split among the circuit courts by citing guidance published by the EEOC that outlines six factors that should be considered in determining whether shareholders-directors (or physician-shareholders, as in the *Clackamas* case) constitute employees. The six factors include:²⁴⁶

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. Whether and, if so, to what extent the organization supervised the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements and contracts; and
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

The Supreme Court ultimately reversed the Ninth Circuit's decision and remanded the case back to the lower court so a judgment could be rendered consistent with its ruling.

241. EEOC v. Dowd & Dowd, 736 F.2d 1177, 1178 (7th Cir. 1984).

242. *Id.*

243. *Wells*, 271 F.3d at 905.

244. *Id.* (quoting *Hyland v. New Haven Radiology Assoc., P.C.*, 794 F.2d 793, 798 (2d Cir. 1986)).

245. *Id.* at 905.

246. *Clackamas*, 123 S. Ct. at 1680.

VI. HEALTH CARE LEGISLATION

A. Modifications of County Hospital Statutes

Effective March 21, 2002, several significant legislative changes were adopted regarding hospitals established under Indiana Code title 16, articles 22 and 12.1. These changes affecting the organization and operation of county-owned hospitals and some instances amends statutes that have been in place for several decades. The newly revised statute eliminates the requirement that county hospital boards be composed of an equal balance of members from each major political party.²⁴⁷ In the case of boards composed of odd numbers of members, the previous requirement was that no more than a simple majority of members could be of the same political party. This statutory change reflects the culmination of nearly three decades of modifications to the county hospital statutes, which have minimized the direct influence of partisan politics in the management and organization of these hospitals. The statute also eliminates the requirement that some county hospital boards be composed in a manner to reflect representation on the board by residents from a certain city or town or from a particular trade or occupation.²⁴⁸ Both of these changes were enacted to provide the appointing authorities of county hospital boards greater flexibility in the selection of suitable board members. To further minimize the influence of partisan politics, the statute was also amended to preclude the appointing authority of the county hospital governing board from serving on that hospital's governing board, except for those hospitals organized under Indiana Code section 16-22-8 wherein the statute mandates service by the appointing authority on the hospital board.²⁴⁹

The statute also permits county hospitals to elect to have audits performed by an independent certified public accounting firm that is experienced in hospital matters.²⁵⁰ If performed, such an independent audit report must be kept on file at the hospital and a copy must be provided to the Indiana State Board of Accounts.²⁵¹ Further, the hospital electing to have an independent audit is required to provide written notice to the State Board of Accounts not less than 180 days prior to the beginning of the hospital's fiscal year in which the hospital elects to be audited by an independent certified public accounting firm.²⁵² For any fiscal year in which a county hospital does not use an independent certified public accounting firm, the State Board of Accounts must audit the hospital.²⁵³ This provision permits county hospitals to function like their not-for-profit and for-profit counterparts with regard to financial affairs.

247. IND. CODE § 16-22-2-2, 3.1 & 5-8 (2002).

248. *See id.*

249. *See id.* § 16-22-2-13.

250. *See id.* § 16-22-3-12(c).

251. *See id.*

252. *See id.* § 16-22-3-12(d).

253. *Id.* § 16-22-3-12(d).

Governing boards of county hospitals are also now permitted to enter into group purchasing agreements to purchase medical malpractice insurance with one or more county hospitals or city hospitals organized and operated under Indiana Code section 16-23-3-21.²⁵⁴

B. Establishment of Interstate Nurse Licensure Compact

Effective July 1, 2002, the General Assembly authorized the Interstate Nurse Licensure Compact for Indiana.²⁵⁵ This Act permits qualified nurses who are licensed in a state that has enacted the compact to practice nursing in any compact state. The Act reduces redundant licensing requirements of nurses who practice in multiple states.²⁵⁶ Compact states will recognize a nurse's license to practice registered nursing which has been issued by his or her home state, as authorizing him or her to practice as a registered nurse in any other compact state.²⁵⁷ This provision is applicable to a registered nurse or a licensed practical nurse.²⁵⁸ Licensure for either category of nurse is dependent upon meeting the home state's requirements for licensure and licensure renewal as well as satisfying all other applicable state laws and regulations.²⁵⁹ Any compact state may, in accordance with that state's due process laws, limit or revoke the multi-state licensure privilege of any nurse to practice in their state and may take any other actions under their applicable state laws necessary to protect the health and safety of their citizens.²⁶⁰ Actions taken by any state shall be reported to the administrator of the Coordinated Licensure Information System, which is a part of the Interstate Nurse Licensure Compact.²⁶¹ The administrator of the Coordinated Licensure Information System shall promptly notify the home state of any actions by any other states in the compact.²⁶² A nurse in a compact state may have licensure in only one compact state at a time issued by the home state.²⁶³ If a nurse changes his or her primary state of residence by moving from one compact state to another and if the nurse obtains a license from the new home state, the license from the former home state is no longer valid.²⁶⁴ However, if a nurse changes his or her primary state of residence by moving from a non-compact state to a compact state, and obtains a license from the new home state, the individual state license issued by the non-compact state is not affected

254. *See id.* § 16-22-3-21.

255. *See id.* § 25-23.2.

256. *See id.* § 25-23.2-1-0.5.

257. *See id.* § 25-23.2-2-1.

258. *Id.*

259. *Id.* § 25-23.2-2-1.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* § 25-23.2-3-2.

264. *Id.* § 25-23.2-3-4(a).

and remains in force.²⁶⁵ In addition, if a nurse changes his or her primary state of residence by moving from a compact state to a non-compact state, the license issued by the prior home state converts to an individual state license valid only in the former host home state without any companion licensure privilege to practice in other compact states as authorized by the statute.²⁶⁶

Either the licensing board of the home state or remote state will promptly report to the administrator of the Coordinated Licensure Information System any adverse actions against the licensee.²⁶⁷ A remote state may take adverse action affecting the multi-state licensure privilege to practice within that state.²⁶⁸ The home state has the authority to impose adverse action against the licensee based upon adverse action taken in a remote state or based upon a factual and legal basis for such action in the home state.²⁶⁹

In furtherance of the Interstate Compact, all party states will participate in a cooperative effort to coordinate data regarding all licensed registered nurses and licensed practical/vocational nurses in the system including information on the licensure and disciplinary history of each nurse as contributed by compact states.²⁷⁰ This will assist in multi-state coordination of nurse license and enforcement efforts.

C. Patient Reports and Records

House Enrolled Act 1200, effective July 1, 2002, modifies an existing statute compelling hospitals licensed under Indiana Code section 16-21 to file data reports with the Indiana State Department of Health. Now such reports will be filed not more than 120 days from the end of each calendar year with the Department or its designated contractor.²⁷¹ The report must contain inpatient and outpatient discharge information at the patient level in a format specified by the State Health Commissioner including length of stay, diagnosis and surgical procedures, date of admission, discharge or birth.²⁷² It also requires reporting of types of admission, admission source, gender, race, discharge disposition, type of payor, total charge for the patient's stay and the zip code of the patient's residence.²⁷³

By amending the statute, the State seeks to obtain more detailed information with regard to patient stays for the aggregation and accumulation of specific data for purposes of public health information. The information reported to the designated contractor is confidential as it relates to data personal to an individual

265. *Id.* § 25-23.2-3-4(b).

266. *Id.* § 25-23.2-3-4(c).

267. *Id.* § 25-23.2-4-2; *see also id.* § 25-23.2-6-2.

268. *Id.* § 25-23.2-4-4.

269. *Id.* § 25-23.2-4-6.

270. *Id.* § 25-23.2-6-1.

271. *Id.* § 16-21-6-6.

272. *Id.*

273. *Id.*

patient.²⁷⁴ The Department may not provide information or analysis that contains any information that personally identifies or may be used to identify a patient or consumer of health care services unless the Department determines such information is necessary for a public health activity.²⁷⁵ The information provided to the Department, except for personal identification data, must be open to public inspection and must be provided to the public by the Department upon request at the Department's actual cost.²⁷⁶

D. Expansion of Practice of Emergency Medical Technician and Advanced Emergency Medical Technicians

Effective July 1, 2002, Senate Enrolled Act 213 modified the existing practice parameters of emergency medical technicians and advanced emergency medical technicians who are certified under Indiana Code section 16-18 by permitting such individuals to administer epinephrine through an auto-injector to an individual who is experiencing symptoms of an allergic reaction or anaphylaxis.²⁷⁷ The Indiana Emergency Medical Services Commission under Indiana Code section 16-31-2-9 will establish the training and certification standards for the administration of epinephrine through an auto-injector.

VII. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT
PRIVACY REGULATIONS

In 1996, Congress passed the Health Insurance Portability and Accountability Act ("HIPAA") which addressed Insurance Portability, Fraud and Abuse and Medical Liability Reform, Administrative Simplification, Tax Related Health Provisions, and Group Health Plan Requirements.²⁷⁸ The Administrative Simplification provisions were further subdivided to reflect three concepts: (i) Electronic Transactions (Standards for Electronic Transactions and Code Sets); (ii) Data Security; and (iii) Privacy.

Congress delegated to the Secretary of Health and Human Services the responsibility of adopting regulations regarding the Electronic Transactions and Data Security, but reserved to Congress the right to adopt privacy legislation. HIPAA, however, did provide that if Congress did not adopt privacy legislation prior to August 21, 1999, the Secretary of Health and Human Services was authorized to adopt regulations governing the privacy of individually identifiable health information. Congress did not adopt privacy legislation by August 21, 1999, and the Secretary of Health and Human Services was left the responsibility of promulgating privacy regulations. The following is a discussion of the privacy regulations that have been issued by the Secretary of Health and Human Services

274. *Id.* § 16-21-6-7(c)(1)(A).

275. *Id.* § 16-21-6-7(d)(1).

276. *Id.* § 16-21-6-7(d)(2) & (3).

277. *Id.* § 16-31-3-23.

278. In the discussion of these regulations that follows, capitalized terms will generally have the same meanings as they are given in the privacy regulations promulgated pursuant to HIPAA.

under HIPAA.

A. Application to Covered Entity and Business Associates

The privacy regulations apply only to Covered Entities. Covered Entities include Health Plans, most Health Care Providers, and Health Care Clearinghouses. The regulations generally define a Health Plan as an individual or group plan that provides, or pays the cost of, medical care.²⁷⁹ A Health Care Provider is a provider of services as defined in 42 U.S.C. § 1395x(u), a provider of medical or health services as defined in 42 U.S.C. § 1395x(s), and any other person or organization who furnishes, bills or is paid for Health Care²⁸⁰ in the normal course of business.²⁸¹ However, only Health Care Providers who transmit Health Information (defined below) in electronic form in connection with a Transaction covered by the regulations governing Standards for Electronic Transactions and Code Sets are covered by the privacy regulations. A Health Care Clearinghouse is a public or private entity, including a billing service, repricing company, community health management information system or community Health Information system, and a “value-added” network or switch, that performs either of the following functions: 1) processes or facilitates the processing of Health Information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a Standard Transaction; or 2) receives a Standard Transaction from another entity and processes or facilitates the processing of Health Information into nonstandard format or nonstandard data content for the receiving entity.²⁸²

While the privacy regulations apply directly only to Covered Entities, the privacy regulations also affect the behavior of certain individuals and entities that perform services for Covered Entities. Such individuals and entities are referred to as Business Associates. A Business Associate is a person or entity who, on behalf of a Covered Entity, performs or assists in the performance of: (i) A function or activity involving the use or Disclosure of Individually Identifiable Health Information or a function regulated by the regulations; or (ii) providing legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services to or for a Covered Entity,

279. Public Welfare, 45 C.F.R. § 160.103 (updated by Health Insurance Reform: Security Standards, 68 Fed. Reg. 8334 (Feb. 20, 2003)).

280. The privacy regulations define Health Care as

care, services, or supplies related to the health of an individual. Health Care includes, but is not limited to, the following: (1) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an Individual or that affects the structure or function of the body; and (2) sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

45 C.F.R. § 160.103.

281. *Id.*

282. *Id.*

where the provision of the service involves the Disclosure of Individually Identifiable Health Information from the Covered Entity, or from another business associate of the Covered Entity.²⁸³ However, members of the Covered Entity's Workforce²⁸⁴ are not Business Associates and Covered Entities that perform services for or on behalf of an organized health care arrangement²⁸⁵ are not Business Associates of the other Covered Entities participating in the Organized Health Care Arrangement.

B. Information Afforded Protection

By regulating Covered Entities and their relationships with Business Associates, the privacy regulations attempt to protect the Use and Disclosure of Protected Health Information. Health Information is "any information, whether

283. *Id.*

284. The regulations define "Workforce" as "employees, volunteers, trainees, and other persons whose conduct, in the performance of work for a Covered Entity, is under the direct control of such entity, whether or not they are paid by the Covered Entity." *Id.*

285. The regulations define an "Organized Health Care Arrangement" as:

- (1) A clinically integrated care setting in which Individuals typically receive Health Care from more than one health care provider;
- (2) An organized system of Health Care in which more than one Covered Entity participates, and in which the participating Covered Entities: (i) Hold themselves out to the public as participating in a joint arrangement; and (ii) Participate in joint activities that include at least one of the following: (A) Utilization review, in which health care decisions by participating Covered Entities are reviewed by other participating Covered Entities or by a third party on their behalf; (B) Quality assessment and improvement activities, in which Treatment provided by participating Covered Entities is assessed by other participating Covered Entities or by a third party on their behalf; or (C) Payment activities, if the financial risk for delivering Health Care is shared, in part or in whole, by participating Covered Entities through the joint arrangement and if Protected Health Information created or received by a Covered Entity is reviewed by other participating Covered Entities or by a third party on their behalf for the purpose of administering the sharing of financial risk;
- (3) A Group Health Plan and a health insurance issuer or HMO with respect to such Group Health Plan, but only with respect to Protected Health Information created or received by such health insurance issuer or HMO that relates to Individuals who are or who have been participants or beneficiaries in such Group Health Plan;
- (4) A Group Health Plan and one or more other Group Health Plans each of which are maintained by the same plan sponsor; or
- (5) The Group Health Plans described in paragraph (4) of this definition and health insurance issuers or HMOs with respect to such Group Health Plans, but only with respect to Protected Health Information created or received by such health insurance issuers or HMOs that relates to Individuals who are or have been participants or beneficiaries in any of such Group Health Plans.

Id.

oral or recorded in any form or medium, that: 1) is created or received by a Health Care Provider, Health Plan, public health authority, employer, life insurer, school or university, or Health Care Clearinghouse; and 2) [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.”²⁸⁶ Individually Identifiable Health Information is “a subset of Health Information, including demographic information collected from an individual, and: 1) is created or received by a Health Care Provider, Health Plan, employer, or Health Care Clearinghouse; and 2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of Health Care to an individual; or the past, present, or future payment for the provision of Health Care to an individual; and (i) [t]hat identifies the individual; or (ii) [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.”²⁸⁷ It is important to note that the definition of “Individually Identifiable Health Information,” while indicating it is a subset of Health Information, does specifically include demographic information that is arguably not included within the definition of Health Information.

What the regulations ultimately protect is “Protected Health Information.” Protected Health Information is a subset of Individually Identifiable Health Information.²⁸⁸ While the proposed regulations provided the type media by which information must be transmitted or maintained in order to be Protected Health Information, the definition in the final privacy regulations included the “catch-all” phrase “[t]ransmitted or maintained in any other form or medium.”²⁸⁹ The inclusion of this “catch-all” phrase renders the prior qualifications in the definition of no consequence, thus resulting in the definitions of Protected Health Information and Individually Identifiable Health Information being identical except for certain information regulated by laws protecting educational records and employment records held by a Covered Entity in its role as an employer.²⁹⁰

The privacy regulations contain provisions by which a Covered Entity can remove identifying information from Health Information and thus remove such information from the category of Protected Health Information.²⁹¹ In order to de-identify Health Information, a Covered Entity must remove elements from the information so that there is no reasonable basis by which the information can be used to identify an individual. A Covered Entity must establish that the information is de-identified in one of two ways. The first approach requires that “[a] person with appropriate knowledge of and experience with generally

286. *Id.*

287. *Id.*

288. *Id.* § 164.501.

289. *Id.*

290. *Id.* Section 164.501 specifically excludes from the definition of Protected Health Information: (i) Education records covered by the Family Educational Right and Privacy Act, as amended, 20 U.S.C. § 1232g; and (ii) Records described at 20 U.S.C. § 1232g(a)(4)(B)(iv).

291. 45 C.F.R. § 164.514.

accepted statistical and scientific principles and methods for rendering information not individually identifiable: (i) [a]pplying such principles and methods, and determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information; and (ii) [d]ocuments the methods and results of the analysis that justify such determination.”²⁹² The second approach requires that the Covered Entity remove a significant portion of identifying information, including, among many other things, names, all geographic subdivisions smaller than a state, including street address, city, county, precinct, zip code, all elements of dates (except year), as well as telephone numbers.²⁹³ Further, the Covered Entity must also not have any actual knowledge that the information could be used alone or in combination with other information to identify the individual who is the subject of the information. The regulations do provide a method by which a Covered Entity may maintain a method to re-identify the information when such information comes back within the control of the Covered Entity; however, the Covered Entity must not disclose the method for re-identification.²⁹⁴

C. Limitation on Use or Disclosure of Protected Information

A Covered Entity may not use or disclose Protected Health Information except as permitted by the regulations. In general, the regulations permit a Covered Entity to use or disclose Protected Health Information for the purposes of treatment, payment and health care operations (“TPO”).²⁹⁵ However, the regulations further clarify that a Covered Entity may use or disclose Protected Health Information for treatment activities of another Health Care Provider or to another Covered Entity or Health Care Provider for the payment activities of the entity that receives the information. Additionally, a Covered Entity may use or disclose Protected Health Information for health care operations activities of the entity that receives the information, if each entity has had a relationship with the individual and the Protected Health Information pertains to such relationship. Lastly, where the Covered Entity participates in an Organized Health Care Arrangement (“OHCA”), it may disclose information to another Covered Entity that participates in the OHCA for any health care operation activities of the OHCA.²⁹⁶

Further, a Covered Entity may use or disclose Protected Health Information

292. *Id.* § 164.514(b)(1).

293. *Id.* § 164.514(b)(2).

294. *Id.* § 164.514(c).

295. See Appendix A for a definition of Treatment, Payment, or Health Care Operations.

296. 45 C.F.R. § 164.506(c).

that is incident to a use²⁹⁷ or disclosure²⁹⁸ otherwise permitted or required by the regulations, provided that the Covered Entity has complied with the minimum necessary standards, as well as the safeguard requirements with respect to such otherwise permitted or required use or disclosure.²⁹⁹ If a Covered Entity wants to use and disclose Protected Health Information for reasons other than those stated above, a Covered Entity must either obtain an authorization³⁰⁰ from the Individual or meet one of the several exceptions to the authorization requirements.³⁰¹

The regulations require that when a Covered Entity uses or discloses Protected Health Information or requests Protected Health Information, it must use reasonable efforts to limit such Disclosure, or request to the minimum information necessary to accomplish the intended purpose.³⁰² However, this requirement does not apply in instances where the Protected Health Information is disclosed to or requested by a Health Care Provider for treatment, requested by the Individual to whom the information relates, disclosed based on an authorization, made to the Secretary, or the Disclosure is required by law.³⁰³

In order to comply with the minimum necessary requirement of the privacy regulations, a Covered Entity must identify those persons or classes of persons in its Workforce who need access to Protected Health Information and designate which portions of the Protected Health Information are necessary to carry out their duties.³⁰⁴ Furthermore, reasonable efforts must be made by the Covered Entity to restrict access to Protected Health Information in accordance with these designations.³⁰⁵

If a Covered Entity must obtain an authorization to use or disclose Protected Health Information, the authorization must be in plain language,³⁰⁶ contain a clear and meaningful description of the information to be used or disclosed,³⁰⁷ identify the person or class of persons authorized to request the Use or Disclosure, and to whom the information may be disclosed.³⁰⁸ The authorization must further provide an expiration date or event,³⁰⁹ state that the Individual has the right to

297. The privacy regulations define “use” as “the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information.” *Id.* § 164.501.

298. The privacy regulations define “Disclosure” as “the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information.” *Id.*

299. *Id.* § 164.502(a)(1)(iii).

300. *Id.* § 164.508.

301. *Id.* § 164.512(a)-(1).

302. *Id.* § 164.514(d)(3)(1).

303. *Id.* § 164.502(b)(2).

304. *Id.* § 164.514(d)(2)(i)(A).

305. *Id.* § 164.514(d)(2)(ii).

306. *Id.* § 164.508(c).

307. *Id.* § 164.508(c)(1)(i).

308. *Id.* § 164.508(c)(1)(ii)-(iii).

309. *Id.* § 164.508(c)(1)(v).

revoke the authorization,³¹⁰ state that information disclosed may be subject to redisclosure by the recipient and no longer be protected,³¹¹ and state that the Covered Entity may not condition Treatment, Payment, enrollment, or eligibility for benefits on the authorization.³¹² Lastly, the authorization must describe the purpose of each requested Use or Disclosure,³¹³ and be signed by the Individual and dated.³¹⁴

Typically, if the Use or Disclosure does not meet one of the exceptions to obtaining an authorization, an authorization must be obtained prior to using or disclosing Protected Health Information. However, the privacy regulations do permit limited Uses and Disclosures in certain circumstances without an authorization. If the individual has been given an opportunity to agree or object, a covered Health Care Provider may use an Individual's name, location in the facility, general description, and religious affiliation for facility directory purposes.³¹⁵ However, the provider can only disclose the name, location, and condition (and not religious affiliation) to persons who ask for the Individual by name. The provider may disclose the religious affiliation of an Individual to a member of the clergy. In addition, a Covered Entity may disclose to a family member or friend Protected Health Information relevant to such person's involvement with the Individual's care or payment related to Health Care.³¹⁶

A Covered Entity may also use demographic information and dates of health care provided for purposes of fundraising for its own benefit (including the benefit of an institutionally related foundation without obtaining an authorization).³¹⁷ However, the fundraising materials must contain information informing the individual how to opt out of future fundraising solicitation efforts.³¹⁸ If a Covered Entity intends to use Protected Health Information for fundraising purposes, a statement that the Protected Health Information will be used for fundraising purposes must be contained in the Covered Entity's Privacy Notice.³¹⁹

A Covered Entity may utilize Protected Health Information to market products and services without an authorization if the marketing is in the form of: (i) a face-to-face encounter with the individual; or (ii) a promotional gift of nominal value.³²⁰ Otherwise, an authorization is required to use or disclose Protected Health Information for marketing. If the marketing involves direct or indirect remuneration to the Covered Entity from a third party, the authorization

310. *Id.* § 164.508(c)(2)(i).

311. *Id.* § 164.508(c)(2)(iii).

312. *Id.* § 164.508(c)(2)(ii).

313. *Id.* § 508(c)(1)(iv).

314. *Id.* § 508(c)(1)(vi).

315. *Id.* § 164.510(a).

316. *Id.* § 164.510(b).

317. *Id.* § 164.514(f).

318. *Id.* § 164.514(f)(2)(ii).

319. *Id.* § 164.514(f)(2)(i).

320. *Id.* § 164.508(a)(3).

must state that such remuneration is involved.

Lastly, “a Covered Entity may use or disclose a limited data set that meets the requirements” set forth in the privacy regulations without obtaining an authorization, if the Covered Entity enters into a data use agreement with the limited data recipient, and the use or disclosure is for Research, public health, or Health Care Operations purposes.³²¹

“A Covered Entity may use Protected Health Information to create a limited data set that meets the requirements” of the regulations, or “disclose Protected Health Information only to a Business Associate for such purpose,” regardless of whether “the limited data set is to be used by the Covered Entity.”³²² Also, “[a] Covered Entity may use or disclose a limited data set . . . only if the Covered Entity obtains satisfactory assurance, in the form of a data use agreement that meets the requirements of [the regulations], that the limited data set recipient will only use or disclose the Protected Health Information for limited purposes.”³²³

“A data use agreement between the Covered Entity and the limited data set recipient must establish the permitted Uses and Disclosures of such information by the limited data set recipient,”³²⁴ consistent with the purposes of Research, public health, or health care operations. Further, “the data use agreement may not authorize the limited data set recipient to use or further disclose the information in a manner that would violate the requirements of [the regulations] if done by the Covered Entity,” must “establish who is permitted to use or receive the limited data set,” and must set forth the obligations of the limited data set recipient.³²⁵

Regardless of whether an authorization is necessary for Use or Disclosure of Protected Health Information, a Covered Entity that has a direct treatment relationship with an Individual (other than an inmate) must provide the Individual with a Notice of Privacy Practices that provides notice of how the Covered Entity will use and disclose the individual’s Protected Health Information,³²⁶ the individual’s rights, and the Covered Entity’s legal duties with respect to the Protected Health Information.³²⁷

D. Rights of Individuals Respecting Protected Information

As set forth in the elements of the Notice of Privacy Practices, the privacy regulations give Individuals certain rights with respect to Protected Health Information. First, “a Covered Entity must permit an individual to request that the Covered Entity restrict: uses and disclosures of Protected Health Information about the Individual to carry out” TPO, and Disclosures otherwise permitted

321. *Id.* § 164.514(e).

322. *Id.* § 164.514(2)(3)(ii).

323. *Id.* § 164.514(e)(4)(i).

324. *Id.* § 164.514(e)(4)(ii)(A).

325. *Id.* § 164.514 (e)(4).

326. *Id.* § 164.520(b)(1)(iv).

327. *Id.* § 164.520(b)(1)(v).

under the privacy regulations.³²⁸ However, a Covered Entity is not required to agree to a restriction.³²⁹

Second, an Individual also has the right of access “to inspect and obtain a copy of Protected Health Information about the Individual in a Designated Record Set,³³⁰ for as long as the Protected Health Information is maintained in the Designated Record Set,” except for Psychotherapy Notes, information compiled in anticipation of legal proceedings, and Protected Health Information maintained by a Covered Entity that is subject to the Clinical Laboratory Improvements Amendments of 1988.³³¹

Third, in addition to the right to request a restriction and the right of access, “an individual has the right to have a Covered Entity amend Protected Health Information or a record about the Individual in a Designated Record Set for as long as the Protected Health Information is maintained in the designated record set.”³³² “A Covered Entity may deny an individual’s request for amendment, if it determines that the Protected Health Information or record . . . was not created by the Covered Entity, unless the Individual provides a reasonable basis to believe that the originator of Protected Health Information is no longer available to act on the requested amendment; is not part of the Designated Record Set; would not be available for inspection” under the privacy regulations, or the record is accurate and complete.³³³

Lastly, an individual has the right “to receive an accounting of Disclosures of Protected Health Information made by a Covered Entity in the six years prior to the date on which the accounting is requested”; however, a Covered Entity is not required to include all Disclosures in the accounting.³³⁴ Importantly, a Covered Entity does not need to include disclosures to carry out TPO, to individuals of Protected Health Information about them, pursuant to an authorization, or that were incident to a Use or Disclosure otherwise permitted. Additionally, a Covered Entity can exclude Disclosures that are part of a limited data set.³³⁵

328. *Id.* § 164.522.

329. *Id.* § 164.522(a)(1)(ii).

330. A “Designated Record Set” is a group of records (any item, collection, or grouping of information that includes Protected Health Information and is maintained, collected, used or disseminated by or for a Covered Entity) maintained by the Covered Entity that is: the medical records and billing records about Individuals maintained by or for the provider; the enrollment, Payment, claims adjudication, and case management record systems maintained by or for a Health Plan; or is used, in whole or in part, by the Covered Entity to make decisions about Individuals.

331. 45 C.F.R. § 164.524.

332. *Id.* § 164.526(a).

333. *Id.* § 164.526(a)(2).

334. *Id.* § 164.528(a)(1).

335. *Id.* § 164.528(a)(i)–(iv).

E. Other Provisions

In order to complete the requirements of HIPAA, the privacy regulations state that “a Covered Entity must designate a privacy official who is responsible for the development and implementation of the policies and procedures of the entity” and that “a Covered Entity must designate a contact person or office who is responsible for receiving complaints” and providing information about matters covered by the Privacy Notice.³³⁶ Further, a Covered Entity must train all members, and subsequent members, of its workforce on the policies and procedures required by the privacy regulations with respect to the Protected Health Information.³³⁷ A Covered Entity must also “have in place appropriate administrative, technical, and physical safeguards to protect the privacy of Protected Health Information” from any “intentional or unintentional use or Disclosure that is in violation of the privacy regulations.”³³⁸ “A Covered Entity must provide a process for Individuals to make complaints concerning the Covered Entity’s policies and procedures . . . or its compliance with such policies and procedures,”³³⁹ and “a Covered Entity must have and apply appropriate sanctions against members of its Workforce who fail to comply with the privacy policies and procedures of the Covered Entity or the requirements” of the privacy regulations.³⁴⁰ Lastly, “a Covered Entity must implement policies and procedures with respect to Protected Health Information that are designed to comply” with the privacy regulations, and “change its policies and procedures as necessary and appropriate to comply with changes in the law.”³⁴¹

The transition provisions of the privacy regulations state that a Covered Entity may continue to use or disclose Protected Health Information “pursuant to an authorization or other express legal permission obtained from an Individual,” permitting the Use or Disclosure of Protected Health Information prior to the compliance date for the Covered Entity “provided that the authorization or other express legal permission specifically permits such Use and Disclosure and there is no agreed-to restriction.”³⁴² For contracts in place with Business Associates as of October 15, 2002, and that will not expire or will not be renegotiated before April 14, 2003, the requirement to include Business Associate contract language is extended by one year to April 14, 2004.³⁴³ Note, however, that the Covered Entity must nevertheless ensure that the Business Associate complies with all applicable requirements as of April 14, 2003. If a contract with a business associate is signed or renegotiated after October 15, 2002, the Covered Entity must have the business associate contract language in

336. *Id.* § 164.530(a).

337. *Id.* § 164.530(b).

338. *Id.* § 164.530(c).

339. *Id.* § 164.530(d).

340. *Id.* § 164.530(e).

341. *Id.* § 164.530(i).

342. *Id.* § 164.532.

343. *Id.* § 164.532(e).

place on or before April 14, 2003. "A covered Health Care Provider must comply with the applicable requirements" of the privacy regulations no later than April 14, 2003. Small Health Plans must comply by April 14, 2004.³⁴⁴

VIII. GENERAL HEALTH LAW

A. Thompson v. Western States Medical Center

In a case with immediate impact upon the relationship between physicians and pharmacists, the United States Supreme Court ruled that the Food and Drug Administration Modernization Act of 1997 ("FDAMA") which banned compounded drug advertising was a restriction of commercial speech prohibited by the First Amendment.³⁴⁵ Pharmacists challenged a portion of FDAMA that exempted compounded drugs from the FDA's standard drug approval process on the condition that the pharmacists refrain from advertising or promoting such drugs.³⁴⁶ Drug compounding is a process whereby a pharmacist "combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient."³⁴⁷ The government, concerned about the possibility of manufacturing disguised as compounding,³⁴⁸ defended its prohibition on the advertising of such drugs, arguing that such prohibition was supported by three substantial government interests: i) "preserving the effectiveness and integrity of the FDCA's new drug approval process and the protection of the public health that it provides"; ii) "preserving the availability of compounded drugs for those individual patients who, for particularized medical reasons, cannot use commercially available products that have been approved by the FDA"; and iii) "achieving the proper balance between those two independently compelling but competing interests."³⁴⁹

In an opinion authored by Justice O'Connor, the Court rejected these interests as insufficiently substantial to justify regulating this exercise of commercial speech. O'Connor stated that "the Government has failed to demonstrate that the speech restrictions are 'not more extensive than is necessary to serve those interests.'"³⁵⁰ She asserted, "[s]everal non-speech-related means of drawing a line between compounding and large-scale manufacturing might be possible here."³⁵¹ She commented in conclusion that "[i]f the First Amendment means anything, it means that regulating speech must be a last—not

344. *Id.* § 164.534 (as amended).

345. *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497 (2002).

346. *Id.* at 1500.

347. *Id.*

348. *Id.* at 1501.

349. *Id.* at 1504.

350. *Id.* at 1506 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), a case that has been since used by the Court as the test for whether a regulation of commercial speech is constitutionally permissible).

351. *Id.*

first—resort.”³⁵² O’Connor stressed that this decision opens the door for increased communication between pharmacists and physicians as to compounding techniques that may help patients with specific pharmaceutical needs.³⁵³

B. Rush Prudential HMO, Inc. v. Moran

In the case of *Rush Prudential HMO, Inc. v. Moran*,³⁵⁴ the Supreme Court attempted to add clarity to the murky boundaries of the scope of the Employee Retirement Income Security Act of 1974 (“ERISA”)³⁵⁵ in preempting state laws. The specific issue before the Court was whether ERISA preempted a state statute, which provided participants in a health maintenance organization (“HMO”) with the right to an independent medical review of benefit denials related to the HMO’s determination that the services were not medically necessary.³⁵⁶ ERISA typically preempts state laws that alter the ERISA civil enforcement scheme, including claims for benefits. Holding that the state statute was not preempted, the Seventh Circuit Court of Appeals noted that although ERISA preempts all state laws that “relate to” employee benefit plans,³⁵⁷ the ERISA savings clause protects from preemption state laws, such as the law at issue, that “regulate insurance.”³⁵⁸ The Supreme Court granted certiorari to settle a conflict in the circuits.³⁵⁹

In this case, an HMO denied coverage for services rendered to a beneficiary on the grounds that such services were not “medically necessary.”³⁶⁰ Following the exhaustion of the internal appeals process, the beneficiary made a written demand for an independent medical review, which was guaranteed under state law.³⁶¹ The HMO failed to provide such independent review and the beneficiary

352. *Id.* at 1507.

353. *Id.* at 1509. O’Connor’s examples of such needs included a pharmacist serving a children’s hospital who could now inform the physicians about alternative ingestion methods for certain drugs and about methods for changing the taste of certain drugs through the addition of flavoring. *Id.* She noted, “The fact that the FDAMA would prohibit such seemingly useful speech even though doing so does not appear to directly further any asserted governmental objective confirms our belief that the prohibition is unconstitutional.” *Id.*

354. 536 U.S. 355 (2002).

355. 29 U.S.C. § 1001 (2000).

356. Illinois’ Health Maintenance Organization Act, 215 ILL. COMP. STAT., ch. 125, § 4-10 (2000).

357. 536 U.S. at 363-64 (citing 29 U.S.C. § 1144(a) (2000)).

358. *Id.* (citing 29 U.S.C. § 1144(b)(2)(A) (2000)).

359. *See Corporate Health Ins., Inc. v. Texas Dep’t of Ins.*, 215 F.3d 526 (5th Cir. 2000).

360. 536 U.S. at 359.

361. 215 ILL. COMP. STAT., ch. 125, § 4-10 (2000) states that each HMO must “provide a mechanism for timely review by a physician,” who holds the same class of license as the primary care physician (PCP) and is unaffiliated with the HMO, “in the event of a dispute between the [PCP] and the [HMO] regarding the medical necessity” of a recommended treatment. If the

sued in state court to compel the HMO's compliance with the state law. The state court ordered an independent review which determined that the services were medically necessary; however, the HMO continued to deny the claim. While the case was pending, the beneficiary proceeded with the treatment, and then amended her complaint to seek reimbursement. The HMO removed the case to federal court arguing that the amended complaint stated a claim under ERISA.³⁶²

The district court denied the beneficiary's claim on the grounds that the state statute was preempted by ERISA. The Seventh Circuit reversed and the Supreme Court affirmed on the grounds that, although the state statute clearly "related to" employee benefits plans for purposes of § 1144(a) of ERISA making it subject to preemption, the state statute also "regulates insurance" under both the "common-sense" test as outlined in *Pilot Life Ins. Co. v. Dedeaux*³⁶³ and the "guidepost" factors set forth in the McCarran-Ferguson Act.³⁶⁴ Specifically, in analyzing the McCarran-Ferguson factors, the Court held that the independent medical review required by the state statute clearly affected the "policy relationship" between the HMO and the beneficiary, and that the statute applied to entities in the insurance industry and did not apply to those entities outside the insurance industry.³⁶⁵ In upholding the Illinois statute allowing beneficiaries to seek an independent medical review of benefit denials that are based on medical necessity, the Court viewed the review of medical necessity determinations as more similar to a "second opinion" than an arbitration, which would be an enlargement of the civil enforcement scheme provided for under ERISA.³⁶⁶

In summing up its rationale for holding that the state statute was not preempted by ERISA, the Court noted that health care is "quintessentially" regulated by state law standards, and therefore, "there is no ERISA preemption without clear manifestation of congressional purpose."³⁶⁷ The Court went on to state that even if federal courts are faced with an increase in benefits litigation

independent physician determines that the treatment is medically necessary, the HMO must provide the covered service. 536 U.S. at 361.

362. 536 U.S. at 362.

363. 481 U.S. 41, 50 (1987).

364. 536 U.S. at 373. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, prohibits a federal law from preempting a state law that regulates insurance. The Court stated, "[a]lthough this is not the place to plot the exact perimeter of the savings clause, it is generally fair to think of the combined 'common-sense' and McCarran-Ferguson factors as parsing the 'who' and the 'what': when insurers are regulated with respect to their insurance practices, the state law survives ERISA." *Id.* at 366. The three factors include whether the state statute (i) relates to a practice that spreads a policyholder's risk; (ii) regulates "an integral part of the policy relationship between the insurer and the insured"; or (iii) is limited to regulating entities "within the insurance industry." *Id.* at 373 (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

365. *Id.* at 374.

366. Joel L. Michaels & Robin J. Bowen, *Rush to Judgment? An Analysis of Rush Prudential HMO, Inc. v. Moran*, HEALTH L. DIG., at 27 (Aug. 2002).

367. 536 U.S. at 387 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000)).

as a result of the state statute, "it would be an exaggeration to hold that the objectives of [ERISA] are undermined."³⁶⁸

Although a quick read of this decision leads one to believe that the previously blurred boundaries of ERISA preemption have been brought into focus, it has possibly just created another challenge for practitioners with regard to anticipating the permissible breadth of a state independent review and appeal process that will survive ERISA preemption under *Rush*.

CONCLUSION

During the survey period, there were several regulatory efforts aimed at curbing health care expenditures at the state and federal level. These efforts have increasingly been combined with regulatory initiatives either to increase enforcement in the area of fraud and abuse or to narrow or clarify existing regulations. Practitioners would be well advised to confer with their health care clients to structure their business affairs to comport with pervasive and complex regulatory requirements affecting health care.

368. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2002 survey period was another busy one for Indiana judges and practitioners in the area of product liability law.¹ During the survey period, October 1, 2001, to September 30, 2002,² state and federal courts in Indiana continued to refine the scope and meaning of the Indiana Product Liability Act ("IPLA").

This survey does not attempt to address in detail all of the cases applying Indiana product liability law that courts decided during the survey period. Rather, it examines selected, representative cases.³ This survey also provides

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The authors thank Brenda Ferguson, Jon Phillips, and Jeremy Johnson for their contributions.

1. This survey article follows the lead of the Indiana General Assembly and employs the term "product liability" (not "products liability") when referring to actions governed by the Indiana Product Liability Act ("IPLA").

2. Three important cases decided in 2002 after the survey period expired are *In re Bridgestone/Firestone, Inc.*, No. IP 000-9373-CB/S, 2002 U.S. Dist. LEXIS 24954 (S.D. Ind. Dec. 19, 2002); *Miller v. Honeywell International, Inc.*, No. IP 98-1742-CM/S, 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. Oct. 15, 2002) and *Vaughn v. Daniels Co.*, 777 N.E.2d 1110 (Ind. Ct. App. 2002). All three cases should be reviewed in next year's survey article.

3. Although they are not addressed in detail in this article, at least two additional cases are worthy of note here. The first case, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), is not discussed in detail in this article because it does not deal with substantive issues of Indiana product liability law. It is, nevertheless, a decision that Indiana practitioners may be interested in from a procedural standpoint. The case involves numerous claimants who allege liability as a result of defective tires. The Seventh Circuit Court of Appeals reversed the district court's order certifying two nationwide class actions, holding that the claimants could not satisfy the commonality and superiority requirements of Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 1020-21.

The second case, *Holt v. Quality Motor Sales, Inc.*, 776 N.E.2d 361 (Ind. Ct. App. 2002), likewise does not deal with substantive issues of Indiana product liability law. It does, however, involve a claim alleging negligent repair of a vehicle's brakes and a failure to warn of the alleged unsafe condition of the brakes. Indiana practitioners may be interested in this case in a general tort sense because it includes an interesting discussion about duties of care and foreseeability when an

background information and context where appropriate and addresses some important issues that the decisions raise.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended the IPLA to apply only to strict liability actions.⁴ In 1995, the General Assembly amended it to once again encompass tort theories of recovery based on both strict liability and negligence theories.⁵

In 1998, the General Assembly repealed the entire IPLA and recodified it.⁶ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The current version of the IPLA, Indiana Code section 34-20-1-1 to section 34-20-9-1, governs and controls all actions that are: "(1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product," regardless of the theory of liability.⁷

The IPLA imposes liability when

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property if: (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition; (2) the seller is engaged in the business of selling the product; and (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.⁸

This first section discusses the scope of the IPLA, and more specifically addresses what kinds of cases the IPLA governs.

A. "... brought by a user or consumer ..."

As noted above, the IPLA governs all claims users or consumers file in Indiana against manufacturers and sellers for physical harm a product causes. Just who are "users" and "consumers" in Indiana? Specific statutory definitions

allegedly defective product is repaired or maintained by a person or entity that did not manufacture the product. *Id.* at 366-67.

4. IPLA, Pub. L. No. 297-1983, § 1, 1983 Ind. Acts 1815.

5. IPLA, Pub. L. No. 278-1995, § 1, 1995 Ind. Acts 4051. See *Progressive Ins. Co. v. General Motors Corp.*, 749 N.E.2d 484, 487n.2 (Ind. 2001).

6. The current version of the IPLA is found at Indiana Code sections 34-20-1-1 to -9-1 (1998).

7. IND. CODE § 34-20-1-1.

8. *Id.* § 34-20-2-1.

and recent cases help answer that question.

For purposes of the IPLA's application, "consumer" means:

- (1) a purchaser; (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4)
- any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.⁹

For purposes of this statute, "user" has the same meaning as "consumer."¹⁰

Even if a claimant falls within one of those statutorily-defined groups, he or she also must satisfy another statutorily-defined threshold before proceeding with an IPLA claim. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires the "user" or "consumer" to be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

The Indiana Supreme Court decided three cases during the survey period concerning who qualifies as "users" and "consumers" for purposes of the IPLA.¹¹ Each of those three cases, *Stegemoller v. ACandS, Inc.*,¹² *Martin v. ACandS, Inc.*,¹³ and *Camplin v. ACandS, Inc.*,¹⁴ has nearly identical operative facts. In all of those cases, the plaintiffs were the wives or the estates of wives whose husbands claimed to have worked around or near asbestos-containing products. The wives claimed that asbestos dust remained on their husbands' work clothes, and that they inhaled the dust brought home from the various workplaces while laundering those work clothes. The wives claimed various illnesses, all allegedly caused by inhalation of asbestos fibers.¹⁵ Plaintiff sued several entities alleged

9. *Id.* § 34-6-2-29.

10. *Id.* § 34-6-2-147.

11. Those three cases join two other cases the Indiana Supreme Court decided during the last few years on the subject of "users" and "consumers" under the IPLA. *See, e.g.,* *Butler v. City of Peru*, 733 N.E.2d 912, 919 (Ind. 2000) (dismissing negligence claim filed before the 1995 IPLA revision, but finding that a maintenance worker could be considered a "user or consumer" of electrical transmission system because his employer was the ultimate user and he was an employee of the "consuming entity"); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 279-80 (Ind. 1999) (extending definition of "user or consumer" to include a distributor who uses the product extensively for demonstration purposes).

12. 767 N.E.2d 974 (Ind. 2002).

13. 768 N.E.2d 426 (Ind. 2002).

14. 768 N.E.2d 428 (Ind. 2002).

15. Lee Stegemoller worked for several years as a union insulator for many different companies and during the course of his career worked with asbestos products. He and his wife, Ramona, contended that some of the asbestos dust remained on his clothes when he left the various jobsites and that she inhaled the dust that he brought home from his workplace. Ramona was diagnosed with colon cancer, pulmonary fibrosis, and pleural thickening, which she alleged was caused by inhalation of asbestos fibers, specifically as the result of interacting with her husband and laundering his work uniforms. *See Stegemoller v. ACandS, Inc.*, 749 N.E.2d 1216, 1218 (Ind. Ct.

to be responsible for the wives' conditions, either because they were involved in the manufacture or sale of asbestos-containing products, they were the successors in interest to such entities, or because they had some other responsibility for the alleged physical conditions. The trial court dismissed the claims, finding that they were not "users" or "consumers" as defined by the IPLA because they were not in the vicinity of the allegedly defective products during their reasonably expected uses and, accordingly, could not be considered "bystanders."¹⁶ Thus, the trial courts held that the wives could not sustain causes of action under the IPLA or at common law.¹⁷ The appellate court affirmed.¹⁸

The Indiana Supreme Court reversed. The defendants argued that the wives who claimed exposure to asbestos dust while at home laundering clothing simply were not in the vicinity of the finished insulation products during the "reasonably expectable use" of those products as insulation material at industrial job sites.¹⁹ The *Stegemoller* court reasoned that such a view was "too narrow."²⁰ "The normal, expected use of asbestos products entails contact with its migrating and potentially harmful residue. We conclude that divorcing the underlying product from fibers or other residue it may discharge is not consistent with the [IPLA]."²¹

It is difficult to gauge just what practitioners in prospective cases should take from *Stegemoller*, *Camplin*, and *Martin*. The decisions either broaden the term "vicinity" or they broaden the term "reasonably expectable use," or perhaps they do both. On the one hand, there does not appear to be any evidence that the wives in these three cases were in the "vicinity" of the end-use insulation products as they were insulating pipes at the industrial jobsites where the husbands worked. On the other hand, it is difficult to argue with the supreme court's logic that the "reasonably expectable" use of asbestos insulation

App. 2001), *rev'd by* 767 N.E.2d 974 (Ind. 2002).

16. The *Stegemollers*, for example, sued several entities believed to be responsible for Ramona's condition, either because they were involved in the manufacture or sale of asbestos-containing products, they were the successors in interest to such entities, or they had some other alleged responsibility for her physical condition. Several of those entities filed motions to dismiss, asserting that Ramona was not a "user or consumer" as defined by the IPLA and, therefore, she had no cause of action. The trial court agreed and dismissed her claims because she did not fall within the IPLA and, further, because there is no common law negligence claim for a user or consumer who sues a seller or a manufacturer separate from that which the IPLA contemplates and governs. *Stegemoller*, 767 N.E.2d at 975-76. The court of appeals affirmed the trial court's decision on both grounds. *Stegemoller*, 749 N.E.2d at 1220.

17. *Stegemoller*, 767 N.E.2d at 975.

18. *Id.* The only published court of appeals opinion was *Stegemoller*, 749 N.E.2d 1216. In an unpublished opinion, the court of appeals in *Martin* followed the analysis put forth in *Stegemoller*. In *Camplin*, the court of appeals requested the supreme court to take the case directly because it had already granted transfer in *Stegemoller* and *Martin*. *Camplin*, 768 N.E.2d at 429.

19. *Stegemoller*, 767 N.E.2d at 976.

20. *Id.*

21. *Id.*

necessarily entails contact with migrating fibers and that it is sometimes difficult for purposes of liability imposition to divorce those fibers from the asbestos-containing end-use products.

The problem for practitioners in light of *Stegemoller*, *Camplin*, and *Martin* is determining how large the “vicinity” of the “reasonably expectable use” is. The supreme court aptly recognizes that maintenance may be part of a product’s reasonably expected use because many products require some amount of clean-up and maintenance attendant to their reasonably expectable use.²² However, most reasonably anticipated maintenance and clean-up associated with a reasonably expectable use is undertaken where the product is located and, thus, within the “vicinity” of the product during what both manufacturers and intended users would consider to be its “reasonably expected use.” That was not the case with the plaintiffs in *Stegemoller*, *Camplin*, and *Martin* because the wives’ residential laundry areas were nowhere near the vicinity of the reasonably expected use of the insulation products when the clean-up (washing the clothes) occurred.

Just how practitioners should interpret *Stegemoller*, *Camplin*, and *Martin* in connection with non-asbestos cases seems open to debate. The brevity of these decisions may indicate that the Indiana Supreme Court was willing to interpret the statute a certain way to apply only to the unique problems associated with asbestos exposure. Time will tell.

B. “. . . against a manufacturer or seller . . .”

As is the case with users and consumers, statutory definitions and recent cases may help practitioners understand which entities can be defendants in an action under the IPLA by virtue of their status as either “manufacturers” or “sellers.”

For purposes of the IPLA, “manufacturer” means “a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”²³ A “seller” means “a person engaged in the business of selling or leasing a product for resale, use, or consumption.”²⁴ Chapter 2 of the IPLA employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the “seller” is “engaged in the business of selling the product.”²⁵

Sellers also can be manufacturers. The definition of “manufacturer” expressly includes a seller who:

- (1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3)

22. *Id.* (citing *Butler v. City of Peru*, 733 N.E.2d 912, 914, 919 (Ind. 2000)).

23. IND. CODE § 34-6-2-77 (1998).

24. *Id.* § 34-6-2-136.

25. *Id.* § 34-20-2-1(2).

alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the name of the actual manufacturer.²⁶

A seller also may be held liable to the same extent as a manufacturer in one other limited circumstance: if the court is "unable to hold jurisdiction over a particular manufacturer" and the seller is the "manufacturer's principal distributor or seller."²⁷

There is one other important provision about which practitioners should be aware when it comes to liability of "sellers" under the IPLA. When the theory of liability is based on "strict liability in tort,"²⁸ Indiana Code section 34-20-2-3 makes it clear that an entity that is merely a "seller" and cannot be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.

In *Williams v. REP Corp.*,²⁹ plaintiff injured his hand in July 1995 while using a rubber injection molding machine.³⁰ Plaintiff sued defendant REP Corporation in state court. REP removed the case to federal court, where the district court granted summary judgment to the defendant because plaintiff failed to produce any evidence that REP Corporation ever sold, leased, or otherwise put into the stream of commerce the allegedly defective machine.³¹ Before granting summary judgment, however, the district court allowed plaintiff to amend his complaint to include a claim against REP France because evidence produced in discovery showed that REP France was the manufacturer of the molding machine.³² The caption was thereafter modified to show the proper defendant as REP International.³³ The district court ultimately dismissed REP International after determining that the court did not have personal jurisdiction over it.³⁴

On appeal, plaintiff argued that REP Corporation could be considered a "manufacturer" pursuant to what is now Indiana Code section 34-6-2-77 because it owned REP International and because REP Corporation was a principal distributor for an entity over which the court could not hold jurisdiction pursuant

26. *Id.* § 34-6-2-77(a).

27. *Id.* § 34-20-2-4.

28. The phrase "strict liability in tort," to the extent that the phrase is intended to mean "liability without regard to reasonable care," appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 makes it clear that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard and not a "strict liability" standard.

29. 302 F.3d 660 (7th Cir. 2002).

30. *Id.* at 661.

31. *Id.*

32. *Id.* at 662.

33. REP Corporation later acknowledged that REP France did not exist and that REP International was the proper entity. *Id.*

34. *Id.*

to Indiana Code section 34-20-2-4.³⁵ The Seventh Circuit rejected this argument and affirmed, recognizing that, by its own plain language, Indiana Code section 34-20-2-1 imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a “manufacturer” or “seller” of a product in Indiana.³⁶ That threshold requirement applies regardless of whether REP Corporation owned part of REP International or whether REP Corporation was a principal distributor for REP International.³⁷

In *Del Signore v. Asphalt Drum Mixers*,³⁸ defendant Asphalt Drum Mixers (“ADM”) manufactured stationary and portable asphalt plants.³⁹ Plaintiff was injured when he fell into a pond of very hot water while shooting a promotional video for ADM at an ADM designed plant in Mexico that was owned and operated by Abraham Martel. ADM’s involvement in the design and construction of Martel’s plant involved preparation of “a concrete foundation drawing for the customer and elevations depicting the layout of ADM’s equipment, together with some suggested pond dimensions.”⁴⁰ The foundation drawing is merely a footprint of ADM’s plant “so the customer will know how much space will be needed.”⁴¹ The ultimate layout of the facility and the size of the ponds are left to the owner/customer. Plaintiff sued ADM claiming that it was a “manufacturer” for purposes of liability pursuant to the IPLA because ADM was “a designer of a component part (i.e., the wetwash pond of its product (i.e., the asphalt plant)).”⁴²

Judge Cosbey granted summary judgment to ADM. After an examination of the Restatement (Third) of Torts, Judge Cosbey recognized that liability only attaches when the manufacturer “substantially participates in the integration of the component into the design of the product.”⁴³ The Restatement (Third) also states that “providing mechanical or technical services or advice concerning a component part does not, by itself, constitute substantial participation.”⁴⁴ According to Judge Cosbey:

[I]t cannot be inferred that ADM designed Martel’s pond or any part of his complex, except perhaps, providing a footprint layout for its own equipment ADM had no control, and indeed very little interest in, where Martel would put his pond, how it would be constructed, or even

35. *Id.* at 664.

36. *Id.* (citing IND. CODE § 33-1-1.5-3(a) (West 1996)).

37. *Id.*

38. 182 F. Supp. 2d 730 (N.D. Ind. 2002).

39. *Id.* at 733.

40. *Id.* at 735.

41. *Id.*

42. *Id.* at 734.

43. *Id.* at 745 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5(b)(1) (1998)).

44. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5 cmt. e (1998)).

whether he was using a pond as opposed to some other water source. While ADM did provide Martel with some technical guidance or advice as to the water volume of the pond, its maximum distance from the plant, and perhaps some dimensions, this did not constitute substantial participation in the integration of the plant with the pond as a matter of law Consequently, ADM was not a 'manufacturer' of Martel's pond under the IPLA.⁴⁵

In *Kennedy v. Guess, Inc.*,⁴⁶ one of the plaintiffs was injured on May 22, 1998, by an umbrella received as a free gift with the purchase of a watch from a Lazarus Department Store.⁴⁷ The plaintiffs alleged both negligence and strict liability theories against the watch manufacturer, the umbrella and watch distributor, as well as the alleged umbrella manufacturer (a Hong Kong corporation) and its domestic affiliate.⁴⁸ Plaintiffs attempted to serve the Hong Kong address of the alleged manufacturer, but were unsuccessful. The trial court granted summary judgment to the watch manufacturer and to the distributor, apparently finding that neither of them could be considered a "manufacturer" for purposes of IPLA liability.⁴⁹

The Indiana Court of Appeals reversed, holding that none of the parties sufficiently designated evidence to establish the application of Indiana Code section 34-20-2-4.⁵⁰ Plaintiffs argued that the watch manufacturer and the distributor could be liable under the IPLA because the court could not "hold jurisdiction" over the alleged Hong Kong manufacturer and because those two entities could be considered the "principal distributor or seller" of the umbrella.⁵¹ Defendant watch manufacturer and distributor countered that neither of them was the "principal distributor or seller," and attempted to so demonstrate by designating statements based on the personal knowledge of their own employees.⁵² Citing the proof requirement for summary judgment under Trial Rule 56, the court determined that the defendants had to designate evidence showing more than just that they were not the principal distributor.⁵³ Without evidence tending to show who actually was the principal distributor, the Indiana Court of Appeals refused to apply Indiana Code section 34-20-2-4 to bar liability.⁵⁴

The Indiana Supreme Court has granted transfer in *Kennedy* and thereby vacated the decision of the court of appeals. Perhaps the Indiana Supreme Court

45. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS § 5 cmt. e (1998) (citation omitted)).

46. 765 N.E.2d 213 (Ind. Ct. App. 2002), *trans. granted, vacated by* No. 29S02-0211-CV-594, 2002 Ind. LEXIS 831 (Ind. Nov. 1, 2002).

47. *Id.* at 215.

48. *Id.* at 215-16.

49. *Id.* at 219.

50. *Id.* at 220.

51. *Id.* at 218.

52. *Id.* at 219.

53. *Id.*

54. *Id.* at 220.

will weigh in on what it means to “hold jurisdiction” for purposes of application of Indiana Code section 34-20-2-4.

In *Goines v. Federal Express Corp.*,⁵⁵ the plaintiff was injured while fabricating and installing conveyors at the Federal Express terminal in Indianapolis.⁵⁶ Plaintiff alleged that a nylon strap used to hold a section of the conveyor bed snapped causing it to fall on him, resulting in injury. The opinion does not indicate when the injury occurred. Plaintiff brought general negligence and strict liability claims against a Minnesota company (Fastenal), which was allegedly the strap manufacturer.⁵⁷ Both claims, although designated as separate, alleged warning and design defects and were based on the same underlying alleged misconduct.⁵⁸ Fastenal filed a cross-claim against a Pennsylvania company (Lift-All), which it claimed manufactured the nylon strap that was sold to Fastenal.⁵⁹

Fastenal filed a motion for summary judgment claiming that it was not liable under the IPLA because it was the manufacturer of the product, but merely a seller with no ability to be deemed liable.⁶⁰ Under the IPLA, “a mere distributor may not be held liable under either strict products liability or negligence.”⁶¹ The plaintiff responded by arguing that under the exception found at Indiana Code section 34-20-2-4, the court could hold Fastenal liable because the court could not “hold jurisdiction over” the actual manufacturer (Lift-All) and because Fastenal was the principal distributor for Lift-All.⁶² According to the court, both parties failed to demonstrate why the court would be unable to “hold jurisdiction over” Lift-All.⁶³ Plaintiff assumed that “jurisdiction . . . refers to the power [of the court] to hear a particular case.” Fastenal argued that the phrase equates to “personal jurisdiction.”⁶⁴ Because Fastenal failed to convince “the court that application of the IPLA entitles it to summary judgment,” the court refused to resolve the issue deciding instead to deny the motion for summary judgment.⁶⁵

In *Ritchie v. Glidden Co.*,⁶⁶ the plaintiff was an employee of a company that painted the inside of modular homes before assembling them. Plaintiff’s left

55. No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002)(applying Indiana law).

56. *Id.* at *4.

57. *Id.* at **4-5.

58. *Id.* at *5.

59. *Id.*

60. *Id.* at *6.

61. *Id.*

62. *Id.* at *9.

63. *Id.* at *12.

64. *Id.*

65. *Id.* at **14-15.

66. 242 F.3d 713 (7th Cir. 2001). The court’s decision in *Ritchie* was issued before the 2002 survey period. However, because of the significance of the case to Indiana practitioners and because issues decided in that case dovetail nicely with points made in this section, the *Ritchie* decision is discussed at length.

index finger had to be amputated after it was accidentally injected with paint while she was checking one of the spray pumps for a possible malfunction. Plaintiff sued two defendants, the manufacturer of the pump (Graco, Inc.) and the supplier of the pump (Glidden Company).⁶⁷

The trial court granted summary judgment to both defendants, and plaintiff appealed to the Seventh Circuit.⁶⁸ The court first determined that summary judgment was inappropriate with regard to the IPLA claim against the manufacturing defendant because there were genuine issues of material fact about whether the pump in question contained a warning.⁶⁹ The court next examined the IPLA claims against Glidden, the seller/supplier. In that connection, the *Ritchie* court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer of the product.⁷⁰ Applying interpretation, the court held that Glidden could not be liable under the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of the alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory requirements by which it could be deemed a manufacturer.⁷¹

There is an omission in the *Ritchie* court's citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: "A product liability action [based on the doctrine of strict liability in tort] may not be commenced or maintained" ⁷² Recall that the *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. As alluded to above, and as will be discussed in more detail below, Indiana Code section 34-20-2-2 makes it clear that "strict liability in tort" now applies only to IPLA cases in which a manufacturing defect is theory supporting why the product was defective and unreasonably dangerous.⁷³ Indiana Code section 34-20-2-2 unequivocally provides that liability, regardless of the exercise of reasonable care, simply does not apply to warning or design claims, which are controlled by a negligence standard.⁷⁴ Thus, if indeed the phrase "strict liability" means "liability without

67. *Id.* at 716.

68. *Id.*

69. *Id.* at 725.

70. *Id.* (The court cites to IND. CODE § 33-1-1.5-3(c) which was later repealed and recodified as IND. CODE § 34-20-2-3).

71. *Id.* at 725-26.

72. *Id.* at 725 (emphasis added) (quoting IND. CODE § 33-1-1-5.3, *repealed by* IND. CODE § 34-20-2-2).

73. IND. CODE § 34-20-2-2 (1998).

74. See, e.g., Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 999 (1996) ("The effect of [Indiana Code § 34-20-2-3 and Indiana Code § 34-20-2-4] is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer.") (emphasis added); see also Burt

regard to the exercise of reasonable care,” then the only theory to which such a standard applies is a manufacturing defect theory. That principle has been recognized in several contexts since 1995. Accordingly, the *Ritchie* court seems to be applying a provision of the IPLA intended, as written, to apply only to sellers in manufacturing defect cases in a negligent failure to warn case.

At least three other decisions since *Ritchie*, involving injuries that appear to have accrued after the 1995 amendments to the IPLA became effective, have interpreted what is now Indiana Code section 34-20-2-3 in the same way as did *Ritchie*. The court in *Kennedy*⁷⁵ accepted this interpretation as correct without much discussion of the proposition that Indiana Code section 34-20-2-3 bars claims against sellers even when the allegations involve design defect theories.⁷⁶ Indeed, the *Kennedy* decision turned on application of Indiana Code section 34-20-2-4 after the court concluded that section 34-20-2-3 “generally restricts the imposition of strict product liability to the manufacturer.”⁷⁷ Because *Kennedy* involved both design and manufacturing claims, one has to conclude that the court reached the same decision as *Ritchie*; namely that application of Indiana Code section 34-20-2-3 is not limited to cases involving only manufacturing defects.

The court in *Goines*⁷⁸ reached the same conclusion discussed above. There, the plaintiff alleged both negligence and strict liability claims that relied on warning and design theories.⁷⁹ Despite the “based on the doctrine of strict liability” language in Indiana Code section 34-20-2-3, the plaintiff conceded that the provision “applies, in general, to products liability *negligence* claims.”⁸⁰ Interestingly, the *Goines* decision does not indicate when the injury occurred. Based upon the factual circumstances of the case, the authors assume that the injury occurred after June 30, 1995, and that the 1995 amendments to the IPLA control the case.

Although much less clear than in *Ritchie* and *Goines*, it appears as though the court in *Williams*⁸¹ may be saying something similar: “Indiana Code section 34-20-2-3 exempts sellers from liability (except when a seller is also the manufacturer)”⁸² Although that language is not quite the ringing endorsement of the position offered by the courts in *Ritchie* and *Goines*, the *Williams* court does not include any limitation to the foregoing language indicating that the seller’s “exemption” applies only in manufacturing defect

v. Makita USA, Inc., 212 F. Supp. 2d 893 (N.D. Ind. 2002).

75. *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 217-18 (Ind. Ct. App. 2002). See *supra* note 46 and accompanying text.

76. *Kennedy*, 765 N.E.2d at 217-18.

77. *Id.* at 217.

78. *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002). See *supra* note 55 and accompanying text.

79. *Goines*, 2002 U.S. Dist. LEXIS 5070 at *9.

80. *Id.* (emphasis added).

81. *Williams v. REP Corp.*, 302 F.3d 660 (7th Cir. 2002).

82. *Id.* at 664.

cases.⁸³

It is possible, of course, that the Indiana General Assembly really intended Indiana Code section 34-20-2-3 to exclude sellers who could not otherwise be deemed manufacturers from cases involving all three product defect theories. If that is true, it is certainly possible that the legislature simply did not realize that the phrase “based on the doctrine of strict liability in tort” should have been rephrased in light of the new statutory scheme. It is equally likely that the legislature intended the statute to be applied exactly as written. Either way, there are at least four recent decisions that have brought the issue to the forefront. It is now up to practitioners, judges, and, perhaps, the Indiana General Assembly to resolve the issue.

C. “. . . for physical harm . . .”

For purposes of application of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁸⁴ It does not include “gradually evolving damage to property or economic losses from such damage.”⁸⁵

Research does not reveal any published opinions during the survey period concerning the “physical harm” requirement.⁸⁶

D. “. . . caused by a product . . .”

For purposes of the IPLA, “product” means “any item or good that is personalty at the time it is conveyed by the seller to another party.”⁸⁷ The term “product” does not include a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”⁸⁸

In this context, practitioners should be aware of one federal decision made during the survey period. In *Great Northern Insurance Co. v. Buddy Gregg Motor Homes, Inc.*,⁸⁹ the plaintiff purchased a used motor home from defendant’s

83. *Id.*

84. IND. CODE § 34-6-2-105 (1998) (internal quotes omitted).

85. *Id.*

86. In the last couple of years, courts in Indiana have issued some important rulings concerning the “physical harm” requirement. *See, e.g.*, *Progressive Ins. Co. v. General Motors Corp.*, 749 N.E.2d 484, 487 (Ind. 2001) (no recovery under the IPLA where the claim is based on damage to the defective product itself); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 495 (Ind. 2001) (personal injury and property damage to other property caused by a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself); *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (in a case brought by a couple against a condom manufacturer, court denied a motion to dismiss, determining that Indiana recognizes that pregnancy, in certain instances, may be considered a “harm”).

87. IND. CODE § 34-6-2-114(a) (1998).

88. *Id.*

89. No. IP-00-1378-CH/K, 2002 U.S. Dist. LEXIS 7830 (S.D. Ind. Apr. 29, 2002).

dealership. The motor home was destroyed in a fire allegedly caused by a defective wire in the engine compartment.⁹⁰ The plaintiffs' insurance company, as subrogee, sued the dealership for the value of the motor home.⁹¹ The court denied recovery for damage to the motor home in light of the Indiana Supreme Court's decision in *Progressive Insurance Co. v. General Motors Corp.*⁹² The insurance company also attempted to state a claim for negligent inspection against the defendant that was separate and apart from the IPLA.⁹³ The court rejected the negligence claim, determining that no reasonable juror could find that the allegedly negligent inspection occurred as part of a transaction for services separate and apart from the purchase of the motor home.⁹⁴

E. "... regardless of the theory of liability . . ."

In the wake of the 1995 amendments to the IPLA, practitioners and sometimes judges have appeared to struggle with what the IPLA covers, and what it does not. Indiana Code section 34-20-1-1 provides that the IPLA governs and controls all actions brought by users and consumer against manufacturers or sellers (under the right circumstances) "for physical harm caused by a product *regardless of the substantive theory of liability.*"⁹⁵ Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA's statutory definitions are not governed by the IPLA.⁹⁶

At the same time, however, the Indiana Code provides that the "[IPLA] shall

90. *Id.* at *4.

91. *Id.* at *1.

92. *Id.* at *8 (citing *Progressive Ins. Co. v. Gen'l Motors Corp.*, 749 N.E.2d 484, 487 (Ind. 2001)).

93. *Id.* at *1.

94. *Id.* at **14-15. A few other recent Indiana decisions are important in this context. *See, e.g.,* *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 122 (Ind. Ct. App. 2001), *trans. denied*, 774 N.E.2d 508 (Ind. 2002) (manufacturer of component parts of a steel rack system sold a product and did not merely provide services because it modified raw steel to produce the component parts and, in doing so, transformed the raw steel into a new product that was substantially different from the raw material used); *New Hampshire Ins. Co. v. Farmer Boy AG, Inc.*, No. IP98-0031-CT/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000) (installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); *Marsh v. Dixon*, 707 N.E.2d 998, 1002 (Ind. Ct. App. 1999) (an amusement ride involved the provision of a service and not the sale of a product); *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1999) (defendant provided products and not merely services it transformed metal block into "new" products and because it repaired damaged products, thus creating "new," substantially different work product).

95. IND. CODE § 34-20-1-1 (1998) (emphasis added).

96. *E.g., New Hampshire Ins. Co.*, 2000 U.S. Dist. LEXIS 19502, **10-11 (claim alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superseded by the theory of strict liability; plaintiff could proceed on a breach of warranty claim so long as it was limited to a contract theory).

not be construed to limit any other action from being brought against a seller of a product.”⁹⁷ That language, when compared with the “regardless of the legal theory upon which the action is brought” language found in Indiana Code section 34-20-1-2 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover.

The courts in *Ritchie*,⁹⁸ *Kennedy*,⁹⁹ and *Goines*,¹⁰⁰ all seem to assume, without hesitation, that claimants in Indiana are free to assert separate “negligence” and “strict liability” claims against “sellers,” and that claimants can utilize warning and design theories in each claim. In *Ritchie*, recall that the plaintiff failed to designate sufficient facts to demonstrate that the seller of a paint spray gun had actual knowledge of alleged product defect (lack of warning labels).¹⁰¹ Accordingly, the court held that the seller could not be considered a “manufacturer” under the IPLA and thus, could not be held liable under the IPLA.¹⁰² Regardless, the *Ritchie* court went on to address the plaintiff’s allegation that she could nevertheless recover from the seller based on a common law negligence claim rooted in Section 388 of the Restatement (Second) of Torts.¹⁰³ That section contemplates liability for suppliers of goods “known to be dangerous for an intended use if the supplier does not use reasonable care to warn the consumer of the dangers of the chattel.”¹⁰⁴ In response to that allegation, the seller argued that the plaintiff had failed to demonstrate a material issue of fact with respect to whether it, in fact, supplied the sprayer.¹⁰⁵ The court found that genuine issues of material fact precluded summary judgment on that issue.¹⁰⁶

In *Kennedy*, after determining that the “sellers” involved were not entitled to summary judgment pursuant to Indiana Code section 34-20-2-4, the court refused to dismiss a common law “negligence” claim against those “sellers” based upon pre-1995 case law and the Restatement of Torts (Second) Section 400.¹⁰⁷ That section of the Restatement (Second) contemplates liability for a seller who “puts out as his own product a chattel manufactured by another . . . as though he were

97. IND. CODE § 34-20-1-1 (1998).

98. *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001).

99. *Kennedy v. Guess*, 765 N.E.2d 213 (Ind. Ct. App. 2002).

100. *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002).

101. See *supra* note 71 and accompanying text.

102. *Ritchie*, 242 F.3d at 713. Whether that decision is consistent with Indiana Code section 34-20-2-3 is addressed *supra*.

103. *Ritchie*, 242 F.3d at 726.

104. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 388 (1965)).

105. *Id.*

106. *Id.*

107. *Kennedy v. Guess*, 765 N.E.2d 213, 211-22 (Ind. Ct. App. 2002), *trans. granted, vacated* by No. 29502-0211-CV-594, 2002 Ind. LEXIS 831 (Ind. Nov. 1, 2002).

its manufacturer.”¹⁰⁸ Both of the Indiana cases cited by the *Kennedy* court to support the existence of a separate common law “negligence” action were 1990 cases¹⁰⁹ (*Koske v. Townsend Engineering Co.*¹¹⁰ and *Moore v. Sitzmark Corp.*¹¹¹). Similarly, the Indiana cases cited in support of the Restatement Second both pre-date the 1995 amendments to the IPLA¹¹² (*Dudley Sports Co. v. Schmitt*¹¹³ and *Lucas v. Dorsey*¹¹⁴).

Goines is strikingly similar to *Kennedy*. In *Goines*, the plaintiff brought what were called “general negligence” and “strict liability” claims against an entity that was a “seller” under the IPLA.¹¹⁵ The claims, although designated as separate, each alleged warning and design defects and both were based on the same underlying alleged misconduct.¹¹⁶ The court held that the “seller” was not entitled to summary judgment pursuant to Indiana Code section 34-20-2-4 with respect to the IPLA/strict liability claims.¹¹⁷ However, the court went on to treat the “negligence” claims separately.¹¹⁸ It granted summary judgment with regard to the design and manufacturing claims because the seller had no duty in light of its lack of knowledge of the alleged defect and its lack of involvement in the manufacturing process.¹¹⁹ The court refused to grant summary judgment with respect to the failure to warn claim, basing its decision upon the “common law” duty to warn as set forth in the 1993 Indiana Court of Appeals decision in *Lucas v. Dorsey Corp.*¹²⁰

In *Ritchie*, *Kennedy*, and *Goines*, it is clear that the courts were subjecting “sellers” to potential liability based on common law negligence theories for the very same “physical harm” covered by the IPLA. In doing so, those courts seem to believe that common law “negligence” claims based upon design and warning theories still exist separate and apart from the IPLA. In support of that belief, the courts routinely cite to cases that were decided before the 1995 amendments to the IPLA and at a time when Indiana still recognized dual-track strict liability and negligence claims. As has been noted above, the 1995 amendments impose negligence standards for design and warning claims and retain strict liability only for manufacturing claims.

The very real question arising out of those cases is whether courts have the

108. *Id.* at 220-21 (quoting RESTATEMENT (SECOND) OF TORTS § 400 (1965)).

109. *Id.* at 220.

110. 551 N.E.2d 437, 443 (Ind. 1990).

111. 555 N.E.2d 1305, 1308 (Ind. Ct. App. 1990).

112. *Kennedy*, 765 N.E.2d at 221.

113. 279 N.E.2d 266, 273 (Ind. App. 1972).

114. 609 N.E.2d 1191, 1201 (Ind. Ct. App. 1993).

115. *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070, at **4-5 (S.D. Ill. Jan. 8, 2002).

116. *Id.* at *5.

117. *Id.* at **14-15.

118. *Id.* at *15.

119. *Id.* at *16.

120. *Id.* at **16-17 (citing *Lucas v. Dorsey*, 609 N.E.2d 1191, 1198 (Ind. Ct. App. 1993)).

power to impose common law negligence liability against “sellers” when the harm allegedly suffered is the same “physical harm” covered by the IPLA. If a “seller” cannot be held liable for “physical harm” that is clearly within the purview of IPLA (*e.g.*, a manufacturing defect theory when the seller has no actual knowledge of the defect and cannot otherwise be deemed a manufacturer pursuant to Indiana Code section 34-20-2-4 or Indiana Code section 34-6-2-77), how can the same entity be liable for the same “physical harm” outside the purview of the IPLA? That idea seems to run contrary to the Indiana General Assembly’s policy determination that the IPLA covers all actions for “physical harm” “regardless of the substantive theory of liability.”¹²¹ It appears to be an open question whether and to what extent such a common law negligence claim for the same “physical harm” covered by the IPLA is an “other action” that Indiana Code section 34-20-1-2 confirms is not limited by the IPLA.

II. THEORIES OF LIABILITY AND RELATED ISSUES

The IPLA, through Indiana Code section 34-20-2-1, imposes liability when a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if: (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition; (2) the seller is engaged in the business of selling the product; and (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.¹²²

That rule of liability is true even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”¹²³ However, the very next paragraph of Indiana Code section 34-20-2-2 takes away what was deemed to be true by subsection (1) (liability without regard to “fault” or reasonable care) with respect to design and warning claims:

However, in an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.¹²⁴

Indiana Code section 34-20-2-2 eliminates the privity requirement between

121. IND. CODE § 34-20-1-1 (1998).

122. *Id.* § 34-20-2-1.

123. *Id.* § 34-20-2-2.

124. *Id.*

buyer and seller for imposition of liability and confirms that a manufacturer's or seller's exercise of reasonable care does not eliminate liability except in cases in which the theory of liability is design defect or warning defect. Indiana courts routinely have recognized that the IPLA imposes a negligence standard in design and warning cases, while retaining strict liability for manufacturing defect cases.¹²⁵ Thus, just as in any other negligence case, a claimant in a design or warning case must prove: (a) duty; (b) breach of that duty; and (c) injury caused by the breach.

Unfortunately for practitioners, some courts have not yet fully grasped the fact that because "strict liability" in its common usage means "liability without regard to reasonable care" in a Restatement of Torts (Second) section 402A sense, use of that term no longer makes sense when dealing with cases alleging design or warning claims. Even though Indiana is years removed from the 1995 amendments to the IPLA, many courts continue to fall into the trap of using "strict liability" when referring to proof requirements in design and warning claims brought under the IPLA.¹²⁶

In Chapter 4 of the IPLA, the focus returns to the IPLA's threshold requirement that only products that are in a "defective condition" are products for which liability may attach pursuant to the IPLA. For purposes of the IPLA, a product is in a "defective condition" if

at the time it is conveyed by the seller to another party, it is in a condition: (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling and consumption.¹²⁷

Claimants in Indiana prove that a product is in a "defective condition" by asserting one or a combination of three theories: (1) the product has a defect that is the result of a malfunction or impurity in the manufacturing process; (2) the product has a defect in its design; or (3) the product lacks adequate or appropriate warnings.¹²⁸ There is a specific statutory provision covering the warning defect theory. It states that:

A product is defective . . . if the seller fails to: (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or

125. See, e.g., *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002).

126. See, e.g., *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 405-06 (Ind. Ct. App. 1999) (court found no error in the trial court's use of the term "strict liability" in its instructions to the jury in a case that was not limited to manufacturing defects).

127. IND. CODE § 34-20-4-1 (1998).

128. E.g., *id.* § 34-20-2; *Burt*, 212 F. Supp. 2d at 899-900.

consumer.”¹²⁹

The IPLA also provides two specific provisions defining when a product is not defective. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”¹³⁰ Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”¹³¹ Those two statutes are consistent with the two requirements for liability set forth in Indiana Code section 34-20-4-1.

The statutes that comprise chapter 4 make it clear that the IPLA requires that the product at issue be both in a condition “not contemplated by expected users or consumers” and “unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways.”¹³² Sections 3 and 4 of chapter 4 solidify that fact, as does recent case law.¹³³ A product is “unreasonably dangerous” if its use “exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge” about the product common to consumers in the community.¹³⁴ “A product is not unreasonably dangerous if it ‘injures in a way which, by objective measure, is known to the community of persons consuming the product.’”¹³⁵

A. Warning Defect Cases

The duty to warn in Indiana consists of two duties: “(1) to provide adequate instructions for safe use, and (2) to provide a warning as to dangers inherent in improper use.”¹³⁶ Pre-IPLA cases extended the duty to warn to all persons who may reasonably be foreseen as coming in contact with a dangerous product.¹³⁷

129. IND. CODE § 34-20-4-2 (1998).

130. *Id.* § 34-20-4-3.

131. *Id.* § 34-20-4-4.

132. *Id.* § 34-20-4-1.

133. *See, e.g., In re Inlow, Accident Litigation*, No. IP99-0830-CH/K, 2002 U.S. Dist. LEXIS 8318, at **66-67 (S.D. Ind. Apr. 16, 2002) (“Although closely related to the question of whether a product is defective because of a failure to warn, a plaintiff must show that the product was unreasonably dangerous as a separate element of a product liability claim.”); *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability).

134. *In re Inlow*, 2002 U.S. Dist. LEXIS 8318, at *66 (quoting IND. CODE § 33-1-1.5-2(7)).

135. *Id.* at *67 (quoting *Anderson v. P.A. Radocy & Sons, Inc.*, 865 F. Supp. 522, 531 (N.D. Ind. 1994), *aff’d*, 67 F.3d 619 (7th Cir. 1995)).

136. *E.g., Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

137. *E.g., Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1162 (Ind. Ct. App. 1988).

The published opinion in *Burt v. Makita USA, Inc.*¹³⁸ is the trial court's order granting summary judgment to defendants. In that case, plaintiff was injured when a blade guard on a circular table saw struck him in the eye.¹³⁹ The saw was manufactured by Makita Corp. and distributed by Makita USA, Inc. Plaintiff's co-worker noticed that the blade guard of the saw involved in the accident was not installed, so he found the blade guard and set about to install it. Realizing that he did not have either a screwdriver or the wrenches needed to complete the installation, the co-worker left the guard on the saw while he went to retrieve the tools. The guard was left in what appeared to be the installed position.¹⁴⁰ However, the bolts needed to secure the guard firmly in place had not been tightened. While the co-worker was away, the plaintiff approached the saw. Plaintiff believed that the guard was in place and that the saw had recently been used. When he began to saw, the guard was thrown off the saw and hit him in the eye.

Plaintiff asserted both design and warning claims. With respect to his warning claims, plaintiff's expert suggested that the saw have warning labels that would make it more difficult for the guard to be left in a position where it appeared installed when in fact it was not.¹⁴¹ The court rejected those claims recognizing that the scope of the duty to warn is determined by the foreseeable uses of the product and that there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances.¹⁴²

In the case of *In re Lawrence W. Inlow, Accident Litigation*,¹⁴³ a Conseco Inc. executive, Lawrence C. Inlow, was killed when he was hit in the head by a rotating helicopter rotor blade after he disembarked from the helicopter.¹⁴⁴ The Inlow Estate filed suit against, among others, several corporate entities involved in the manufacturing and distribution of the helicopter.¹⁴⁵ The claims against the manufacturer and distributor defendants alleged liability based upon their failure to warn the executive and/or the Conseco pilots of the risks associated with disembarking from the helicopter while the blades were slowing down.¹⁴⁶

Judge Hamilton granted summary judgment to the manufacturer and distributor defendants with regard to all of the Estate's claims against them, including claims for negligence, product liability, fraud, and constructive fraud.¹⁴⁷ The court first determined that, as a matter of law, the manufacturer and distributor defendants did not have a duty to warn helicopter operators or

138. 212 F. Supp. 2d 893 (N.D. Ind. 2002).

139. *Id.* at 895.

140. *Id.*

141. *Id.*

142. *Id.* at 899.

143. No. IP99-0830-CH/K, 2002 U.S. Dist. LEXIS 8318, at *1 (S.D. Ind. Apr. 16, 2002).

144. *Id.* at *1.

145. *Id.* at **1-2.

146. *Id.* at *3.

147. *Id.* at *69.

passengers “about known, open, and obvious dangers that moving and decelerating rotor blades pose for exiting or boarding passengers.”¹⁴⁸ The court also determined that “the fact that decelerating rotor blades pose a greater risk is obvious to trained pilots,” who are qualified as “sophisticated intermediaries” under Indiana law such that the “manufacturer [had] no duty to warn helicopter passengers about that specific risk” of greater danger as the blades are decelerating.¹⁴⁹

The court next pointed out that the Estate’s claim also failed because the helicopter, “although dangerous, was not ‘unreasonably dangerous’ under the IPLA.”¹⁵⁰ On this point, the court held that the Estate’s claim failed because Inlow’s death was “caused by the known risk of physical injury from being struck by a decelerating rotor blade.”¹⁵¹ The helicopter simply did not place Inlow “at risk ‘of injuries different in kind from those the average [user] might anticipate.’”¹⁵²

In *Morgen v. Ford Motor Co.*,¹⁵³ a pre-IPLA case (accrual in 1993), Morgen was severely injured in a rear-end collision while riding in the rear seat of a Ford Escort.¹⁵⁴ He sued Ford, claiming that the Escort was defective and that Ford failed to provide reasonable warnings.¹⁵⁵ Morgen’s experts claimed that the structural design of the car reduced occupant survival space or headroom.¹⁵⁶ The trial court refused to read an Indiana Pattern Jury Instruction to the effect that Ford had a duty to warn about latent defects, deciding that the case was not a warning defect case but rather a design defect case.¹⁵⁷ The court of appeals reversed, pointing out that there was testimony that Morgen would not have sat in the backseat of the Escort if a warning had been provided and that a warning would have caused the car’s owner not to have purchased it and not to have allowed Morgen to ride in the backseat.¹⁵⁸ Thus, according to the court, such testimony “provides the causal relationship between the breach of the duty to warn and the injury sustained to support giving the warning instruction.”¹⁵⁹ The *Morgen* court also concluded that other tendered instructions simply did not properly inform the jury about the information that Ford needed to possess about defects in its product to trigger a duty to warn.¹⁶⁰ The Indiana Supreme Court has

148. *Id.* at **3-4.

149. *Id.* at *4.

150. *Id.* at *66.

151. *Id.* at *68.

152. *Id.*

153. 762 N.E.2d 137 (Ind. Ct. App. 2002), *reh’g denied*, 2002 Ind. App. LEXIS 791 (Ind. Ct. App. Apr. 22, 2002), *trans. granted, vacated by* 2002 Ind. LEXIS 852 (Ind. Nov. 1, 2002).

154. *Id.* at 139.

155. *Id.*

156. *Id.* at 140.

157. *Id.* at 144.

158. *Id.* at 145.

159. *Id.*

160. *Id.* at 146.

granted transfer in *Morgen*, and thereby vacated the decision. Indiana practitioners look forward to the court's pronouncements.

In *McClain v. Chem-Lube Corp.*,¹⁶¹ a welder sued the manufacturer and seller of anti-spatter compound, claiming injuries as a result of exposure to fumes and vapors associated with use of the compound.¹⁶² The trial court granted summary judgment because the manufacturer and seller designated evidence that the compound complied with OSHA standards for formaldehyde emission.¹⁶³ The plaintiffs' duty to warn claim was not addressed. According to the court, however, the designated evidence showed that both defendants knew that the product was to be used in conjunction with high temperatures that occurred as a result of the hot welding process.¹⁶⁴ The *McClain* court held that the trial court should have addressed the issue, and that genuine issues of material fact existed with respect to whether the risks inherent in the use of the anti-spatter product were unknown or unforeseeable and whether or not the defendants had a duty to warn of the dangers inherent in the use of the product.¹⁶⁵

B. Design Defect Cases

Indiana courts have required plaintiffs in design cases to prove what practitioners and judges often refer to as a "feasible alternative design."¹⁶⁶ Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.¹⁶⁷ Judge Easterbrook has described that a design claim in Indiana is a "negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents."¹⁶⁸

In addition to the failure to warn claim, the *Burt* case discussed above also involved design defect allegations. Recall that the plaintiff in *Burt* was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be the installed position. With respect to his design claims, plaintiff's expert suggested that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw.¹⁶⁹ The court rejected the claim, holding that the plaintiff has "wholly failed to show a feasible alternative design that would have reduced the risk of injury."¹⁷⁰

161. 759 N.E.2d 1096 (Ind. Ct. App. 2001).

162. *Id.* at 1099.

163. *Id.* at 1100.

164. *Id.* at 1104.

165. *Id.*

166. *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

167. *Id.*; *Whitted v. General Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995).

168. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

169. 212 F. Supp. 2d at 895.

170. *Id.* at 900.

C. Manufacturing Defect Cases

In *Chapman v. Maytag Corp.*,¹⁷¹ Kyle Chapman was electrocuted when he came into contact with some ductwork in the crawl space of a home at which family members were sustaining minor electrical shocks.¹⁷² The special representative of Kyle's estate sued Maytag, the manufacturer of a stove that allegedly contained a defective wire.¹⁷³ The district court denied Maytag's motion for summary judgment and its efforts to exclude the testimony of the plaintiffs' purported expert witness.¹⁷⁴ Thereafter, the parties tried the case to a jury, which returned a verdict and substantial damages in favor of the plaintiffs.¹⁷⁵ The Seventh Circuit reversed, determining that the district court failed to properly apply Daubert principles¹⁷⁶ when considering the admissibility of the testimony of plaintiff's purported expert.¹⁷⁷ With respect to two other key product liability issues, the Seventh Circuit affirmed the district judge.¹⁷⁸

One of those other two key issues involved Maytag's ability to "warn" its way out of a manufacturing defect claim. The parties did not dispute that the stove had a manufacturing defect in that it contained a wire that had become pinched between a metal housing cover and the metal back of the stove during the assembly process.¹⁷⁹ Maytag nevertheless argued that the range was delivered with a host of warnings advising consumers that the failure to plug the range into a properly grounded three-hole receptacle in compliance with local rules and the NEC could result in a shock hazard.¹⁸⁰ Kyle Chapman had incorrectly installed the outlet into which the range was plugged, which rendered that outlet devoid of a grounding wire and, therefore, contrary to the foregoing product warnings.¹⁸¹

The Seventh Circuit agreed with the district judge that "'adequate warnings will not render a product with a manufacturing defect non-defective,' regardless of whether compliance with the warnings would have rendered the product safe."¹⁸² "Accordingly, it was well within the discretion of the district court to hold that warnings will save a product from being defective only when a product is without manufacturing defects."¹⁸³

171. 297 F.3d 682 (7th Cir. 2002).

172. *Id.* at 685.

173. *Id.*

174. *Id.* at 687.

175. *Id.*

176. *Id.* at 686-87.

177. *Id.* at 687.

178. *Id.* at 689.

179. *Id.* at 685.

180. *Id.* at 684-85.

181. *Id.* at 685.

182. *Id.* at 689.

183. *Id.*

D. Duty & Proximate Causation

In *City of Gary v. Smith & Wesson Corp.*,¹⁸⁴ the City of Gary and its mayor sued several handgun manufacturers, distributors, and retailers, alleging negligent marketing, distribution, sale, and failure to warn. Allegations included: (1) breach of duty for creating and supplying and supporting an illegitimate secondary market for handguns; (2) failure to exercise reasonable care in marketing, manufacture, distribution, and sale of guns; and (3) negligent design, manufacture, distribution, and sale of guns with inadequate, incomplete, or nonexistent warnings regarding the risks of harm.¹⁸⁵ The city alleged a separate design defect claim against the manufacturers for failure to include adequate safety devices.¹⁸⁶ The court rejected all such bases of liability, holding that no duty of care existed between the parties because the attenuated relationship between the city and the defendants rendered the connection between the harm alleged by the city and the conduct of the defendants tenuous and remote.¹⁸⁷ The court concluded that the city simply was not a reasonably foreseeable plaintiff injured in a reasonably foreseeable manner.¹⁸⁸

The *Morgen*¹⁸⁹ case discussed above also involves duty and proximate causation questions. Recall that the case involved a plaintiff who was severely injured in a rear-end collision while riding in the rear seat of a Ford Escort. He sued Ford, claiming that the Escort was defective and that Ford failed to provide reasonable warnings.¹⁹⁰ The trial court refused to instruct the jury that the accident could have had several proximate causes.¹⁹¹ Instead, the trial court instructed the jury that Morgen could not recover from Ford if the evidence showed that his injuries were caused solely by the conduct of the driver who collided with the car in which Morgen was riding.¹⁹² According to the *Morgen* court, there can be more than one proximate cause in a product liability case and, therefore, a plaintiff need not prove that the defective product was the sole proximate cause of the injury.¹⁹³ Ultimately, because the use of the word "solely" in the instruction given informed the jury that there could be more than one proximate cause, the trial court did not err in giving the instruction.¹⁹⁴ However, the court admonished the parties that it would be preferable to "specifically instruct the jury that there can be more than one proximate cause of

184. 776 N.E.2d 368 (Ind. Ct. App. 2002).

185. *Id.* at 384.

186. *Id.*

187. *Id.* at 388.

188. *Id.*

189. *Morgen v. Ford Motor Co.*, 762 N.E.2d 137 (Ind. Ct. App. 2002), *reh'g denied*, 2002 Ind. App. LEXIS 791 (Ind. Ct. App. Apr. 22, 2002), *trans. granted, vacated by* 2002 Ind. LEXIS 852 (Ind. Nov. 1, 2002).

190. *Id.* at 139.

191. *Id.* at 140.

192. *Id.* at 147.

193. *Id.*

194. *Id.*

an injury.”¹⁹⁵

III. LIMITATIONS AND REPOSE ISSUES

A. Statute of Limitations

The IPLA provides, in relevant part, that “a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer.”¹⁹⁶ Practitioners and judges alike generally refer to the first clause of that statute as the statute of limitations and to the latter as the statute of repose.

The IPLA does not define the meaning of “accrues” for purposes of fixing the two-year statute of limitations generally applicable to all product liability actions in Indiana. However, Indiana courts have adopted a discovery rule for the accrual of tort-based damage claims caused by an allegedly defective product. Indeed, in *Degussa Corp. v. Mullens*,¹⁹⁷ the Indiana Supreme Court made it clear that the date upon which a product liability claim accrues depends upon a subjective analysis of a patient’s communications with his or her doctor about when a causal link between a disease and the defendant’s product is established. “Once a plaintiff’s doctor expressly informs the plaintiff that there is a ‘reasonable possibility, if not a probability’ that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law.”¹⁹⁸ “When a doctor so informs a potential plaintiff, the plaintiff is deemed to have sufficient information such that he or she should promptly seek ‘additional medical or legal advice needed to resolve any remaining uncertainty or confusion’ regarding the cause of his or her injuries, and therefore be able to file a claim within two years of being informed of a reasonably possible or likely cause.”¹⁹⁹

195. *Id.*

196. IND. CODE § 34-20-3-1 (1998).

197. 744 N.E.2d 407 (Ind. 2001).

198. *Id.* at 411.

199. *Id.* In addition,

[a]n unexplained failure to seek additional information should not excuse a plaintiff’s failure to file a claim within the statutorily defined time period. . . . Although “events short of a doctor’s diagnosis can provide a plaintiff with evidence of a reasonable possibility that another’s product caused his or her injuries, a plaintiff’s mere suspicion or speculation that another’s product caused the injuries is insufficient to trigger the statute.”

Id. See also *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87-88 (Ind. 1985) (a cause of action accrues when the claimant knew or should have discovered that he or she “suffered an injury or impingement, and that it was caused by the product or act of another”). See also Nelson A. Nettles, *When Does A Product Liability Claim “Accrue”? When Is It “Filed”?*, IND. LAW., May 9, 2001, at 23.

The Seventh Circuit followed *Degussa Corp.* in *Nelson v. Sandoz Pharmaceuticals Corp.*²⁰⁰ In that case, the trial court granted summary judgment to a pharmaceutical manufacturer based on the IPLA statute of limitations.²⁰¹ After concluding that Indiana law applied, the Seventh Circuit reversed.²⁰² The court first cited *Degussa Corp.* for the proposition that the statute of limitations “begins to run from the date that the plaintiff knew or should have discovered that she suffered an injury or impingement and that it was caused by the product or act of another.”²⁰³ According to the Seventh Circuit, the plaintiff’s suspicion, standing alone, was insufficient to trigger the limitations period. That period begins to run if a physician suggests a reasonable possibility, if not a probability, of a causal connection between the illness alleged and the product involved.²⁰⁴

B. Statute of Repose

Indiana Code section 34-20-3-1 provides, in relevant part, that “a product liability action must be commenced within . . . ten (10) years after the delivery of the product to the initial user or consumer.”²⁰⁵ The statute of repose gets a little more complicated in the last two years of the 10-year period mentioned above. Indiana Code section 34-20-3-1(b) provides that “if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.”²⁰⁶ Practitioners should be wary here in light of some very specific statutory language. Note that subsection (b) grants the full two-year period after accrual if the cause of action accrues at least eight years but less than ten years after initial delivery. If accrual occurs ten years to the day after the initial delivery, it would appear as though suit must be filed that day because the additional two-year period only applies if accrual occurs at any time less than ten years after initial delivery.

Recent case law confirms that there are at least two situations in which a manufacturer can be liable even beyond ten years after delivery to the initial user or consumer: (1) when the manufacturer supplies replacement parts for the product and the replacement parts are the cause of the plaintiffs’ injury; and (2) when the manufacturer rebuilds the product, such that the rebuild significantly extends the life of the product and thereby restores it to like-new condition.

The Indiana Supreme Court has recognized the utility and underlying policy justifications for the existence of a statute of repose and has reaffirmed that the wisdom of the policy underlying a product liability statute of repose is a question

200. 288 F.3d 954 (7th Cir. 2002).

201. *Id.* at 958.

202. *Id.* at 965.

203. *Id.* at 966 (quoting *Degussa*, 744 N.E.2d at 410).

204. *Id.* at 966-67.

205. IND. CODE § 34-20-3-1(b)(2) (1998).

206. *Id.* § 34-20-3-1(b).

for the legislature.²⁰⁷ Moreover, the Indiana Supreme Court in *McIntosh v. Melroe Co.*²⁰⁸ has held that application of the statute of repose does not violate article I, sections 12 or 23 of the Indiana Constitution.²⁰⁹

During the survey period, the Seventh Circuit recognized the existence and implications of *McIntosh*. In *Land v. Yamaha Motor Corp.*,²¹⁰ the estate of a man killed in an explosion while trying to start a WaveRunner sued the manufacturer. The WaveRunner involved was first sold or delivered to a consumer on July 28, 1987, more than ten years before the explosion, which occurred on June 25, 1998.²¹¹ After determining that Indiana law applied, the trial judge held that the IPLA's ten-year statute of repose barred the claim.²¹² In doing so, the trial judge rejected plaintiffs' attempt to circumvent the statute of repose by arguing that defendants breached duties to warn users of dangerous defects in the WaveRunner long after the original sale.²¹³ The Seventh Circuit affirmed, concluding that the statute of repose cannot be circumvented by claiming that the manufacturer continued its negligence after the initial sale by failing to warn customers of known dangers.²¹⁴ The Seventh Circuit also concluded that post-sale failure-to-warn claims merge with the underlying product liability claims that are barred, in their entirety, by the statute of repose.²¹⁵ In response to an argument that the statute of repose was unconstitutional, the Seventh Circuit noted that *McIntosh* already had conclusively addressed that issue.²¹⁶

In *Menchofer v. Honeywell, Inc.*,²¹⁷ the plaintiff's business facilities were destroyed in a fire that plaintiffs claimed was not timely detected by an alarm system purchased from and monitored by Honeywell.²¹⁸ Plaintiffs purchased the system from Honeywell in 1980.²¹⁹ The fire occurred in 1998. Accordingly, Honeywell moved for summary judgment, arguing that the IPLA statute of repose barred plaintiffs from maintaining a product liability action against it.²²⁰ Plaintiffs responded by arguing that their claims were based on Honeywell's ongoing monitoring, supervision, and maintenance of the alarm system.²²¹ Because those claims sound in negligence and because it was clear that the product was sold to its initial user more than ten years before the fire, Judge

207. Estate of Shebel v. Yaskawa Elec. Am., Inc., 713 N.E.2d 275, 278 (Ind. 1999).

208. 729 N.E.2d 972 (Ind. 2000).

209. *Id.* at 973.

210. 272 F.3d 514 (7th Cir. 2001).

211. *Id.* at 515-56.

212. *Id.* at 517.

213. *Id.* at 518.

214. *Id.*

215. *Id.*

216. *Id.*

217. No. IP-99-1674-CB/S, 2002 U.S. Dist. LEXIS 260 (S.D. Ind. Jan. 7, 2002).

218. *Id.* at *4.

219. *Id.* at *1.

220. *Id.* at **5-6.

221. *Id.* at (6).

Barker granted summary judgment to Honeywell to the extent that plaintiffs were attempting to make a product liability claim.²²²

C. Statute of Repose in Asbestos Exposure Cases

Indiana Code section 34-20-3-2 provides that “[a] product liability action that is based on: (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos must be commenced within two (2) years after the cause of action accrues.”²²³ That exception regarding asbestos applies, however, “only to product liability actions against (1) persons who mined and sold commercial asbestos; and [to product liability actions against] funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.”²²⁴

The crux of the continuing controversy is the phrase, “[p]ersons who mined *and* sold commercial asbestos.”²²⁵ Plaintiffs argue that the *and* should be read as an *or*, while defendants contend that the statute applies to create an exception to the limitations and repose periods only for claims against those entities that both mined and sold commercial asbestos. There is also a debate about the intended meaning of the term “commercial asbestos.”

The survey period decision in *Harris v. ACandS, Inc.*²²⁶ joins at least seven other appellate opinions handed down in the last four years interpreting the asbestos statute of repose. Each of those cases involved damages allegedly caused by inhalation of dust after working with or around asbestos-containing products. In five of those cases, a majority of the appellate panels held that the Indiana Code section 34-20-3-2 exception to the IPLA repose period applies to entities that mined commercial asbestos, even if they did not sell it, and to entities that sold commercial asbestos, even if they did not mine it.²²⁷ In one of

222. *Id.*

223. IND. CODE 34-20-3-2(a) (1998).

224. *Id.* § 34-20-3-2(d).

225. *Id.* (emphasis added).

226. 766 N.E.2d 383 (Ind. Ct. App. 2002).

227. See *Black v. ACandS, Inc.*, 752 N.E.2d 148 (Ind. Ct. App. 2001); *Poirier v. A.P. Green Servs., Inc.*, 754 N.E.2d 1007 (Ind. Ct. App. 2001); *Fulk v. Allied Signal, Inc.*, 755 N.E.2d 1198 (Ind. Ct. App. 2001); *Parks v. A.P. Green Indus., Inc.*, 754 N.E.2d 1052 (Ind. Ct. App. 2001); *Allied Signal, Inc. v. Estate of Herring*, 757 N.E.2d 1030 (Ind. Ct. App. 2001).

Clearly, the intent of the legislature in enacting § 34-20-3-2 was at least in part to acknowledge the long latency period of asbestos-related injuries. Without the § 34-20-3-2 exception, the statute of limitations and statute of repose would be meaningless for the vast majority of people harmed by exposure to asbestos. Asbestos-related injuries would truly be a wrong without a remedy. Equally clear is that the legislature thus could not have intended by enacting § 34-20-3-2 to so severely limit the means of recovery.

Black, 752 N.E.2d at 154.

those cases, *Estate of Jurich v. Garlock, Inc.*²²⁸ the panel concluded that the defendants sold asbestos-containing products, not “commercial asbestos,” but nevertheless held that the defendants could not use the IPLA’s statute of repose to bar the claim because the statute violates article 1, section 12 of the Indiana Constitution. In another of these cases, *Sears Roebuck and Co. v. Noppert*,²²⁹ the panel concluded as a matter of law that the exception to the ten-year product liability statute of repose contained in Indiana Code section 34-20-3-2 applies only to claims against persons who mined and sold commercial asbestos and against funds described in that section.²³⁰

On November 20, 2001, the Indiana Supreme Court, in the case of *Allied Signal, Inc. v. Ott*,²³¹ granted emergency transfer of a direct appeal of an Allen Superior Court interlocutory order denying motions for summary judgment after finding, as did *Jurich*, that Indiana Code section 34-20-3-2 violates article I, sections 12 and 23 of the Indiana Constitution.²³² The Indiana Supreme Court heard oral argument in *Ott* on May 16, 2002.²³³

IV. THE STATE OF THE ART AND GOVERNMENTAL COMPLIANCE PRESUMPTION

The IPLA, by Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a presumption that the product causing the physical harm is not defective and that the product’s manufacturer or seller is not negligent if,

before the sale by the manufacturer, the product: (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured,

228. 759 N.E.2d 1066 (Ind. Ct. App. 2001).

229. 705 N.E.2d 1065 (Ind. Ct. App.), *trans. denied*, *Sears v. Noppert*, 726 N.E.2d 300 (Ind. 1999).

230. *Id.* at 1068. The court in *Noppert* made its decision in the context of whether the Nopperts had a meritorious claim in the context of a motion brought pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure. In doing so, the *Noppert* court concluded that, “while courts in Indiana have on occasion construed an ‘and’ in a statute to be an ‘or,’ we find that there is no ambiguity in this statute requiring such an interpretation.” *Id.* (footnotes omitted).

231. Supreme Court Cause Number 02S04-0110-CV-599 (decision pending).

232. *Id.*

233. On March 25, 2003, the Indiana Supreme Court reversed the trial court in *Ott*, concluding that Indiana Code section 34-20-3-2 did not apply to entities which merely incorporated asbestos into finished products and did not mine and sell commercial asbestos. *See Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003), *reh’g denied*. Indiana Code section 34-20-3-1 withstood a facial challenge to its constitutionality under article 1, section 12 and article 1, section 23 of the Indiana Constitution. The supreme court remanded the case to determine if Indiana Code section 34-20-3-1 violates article 1, section 12 as applied to the Otts. The supreme court also reversed the Indiana Court of Appeals decisions discussed above. *See, e.g., Jurich v. Garlock*, 785 N.E.2d 1093 (Ind. 2003); *Allied Signal, Inc. v. Herring*, 785 N.E.2d 1090 (Ind. 2003); *Harris v. AC & S, Inc.*, 785 N.E.2d 1087 (Ind. 2003); *Black v. AC & S, Inc.*, 785 N.E.2d 1084 (Ind. 2003).

packaged, and labeled; or (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.²³⁴

Recent case law demonstrates that the rebuttable presumptions established in Chapter 5 of the IPLA do not shift the burden of proof, but rather they impose upon the opposing party a burden of producing evidence sufficient to rebut the presumption.²³⁵ The quality of the evidence necessary to rebut the presumption remains something that trial judges should decide on a case-by-case basis as a matter of law.

The case of *McClain v. Chem-Lube Corp.*,²³⁶ discussed above in the context of warning defects, also involved passages addressing the presumption. Recall in that case that a welder sued the manufacturer and seller of anti-spatter compound, claiming injuries as a result of exposure to fumes and vapors associated with use of the compound.²³⁷ The trial court granted summary judgment because the manufacturer and seller designated evidence that the compound complied with OSHA standards for formaldehyde emission.²³⁸ The court of appeals reversed, concluding, in part, that: (1) the trial court failed to address whether there was sufficient evidence designated to rebut the "safety state of the art" presumption²³⁹ with respect to whether OSHA compliance is proof that the anti-spatter compound is not defective and that the defendants are not negligent; and (2) the plaintiff sufficiently rebutted the "governmental compliance" presumption because there was sufficient evidence designated to create a factual dispute with regard to whether the OSHA standard concerning formaldehyde emission had been met.²⁴⁰

In *Cansler v. Mills*,²⁴¹ the plaintiff's car rear-ended another car, which had veered into plaintiff's lane of traffic. The plaintiff was injured when his airbag failed to deploy.²⁴² The plaintiff testified that he was traveling at a speed of forty-five to fifty miles per hour when the accident occurred. Plaintiff's vehicle sustained significant front-end damage.²⁴³ The trial court granted summary judgment to the car's manufacturer, finding first that plaintiff's mechanic was not qualified to render an admissible opinion concerning the air bag's failure to

234. IND. CODE § 34-20-5-1 (1998).

235. See *Cansler v. Mills*, 765 N.E.2d 698 (Ind. Ct. App. 2002); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001).

236. 759 N.E.2d 1096.

237. *Id.* at 1099.

238. *Id.* at 1100.

239. IND. CODE § 34-20-5-1(1) (1998).

240. *Id.* at 1102-03.

241. 765 N.E.2d 698 (Ind. Ct. App. 2002).

242. *Id.* at 701.

243. *Id.*

deploy.²⁴⁴ Because the mechanic's opinion was deemed inadmissible, the trial court determined that the plaintiff failed to rebut the presumption that the car was not defective by virtue of the manufacturer's compliance with a Federal Motor Vehicle Safety Standard.²⁴⁵

The Indiana Court of Appeals reversed, holding that the trial court abused its discretion in disregarding the mechanic's testimony and in determining that plaintiff had failed to rebut the presumption of non-defectiveness.²⁴⁶ With regard to the rebuttable presumption issue, the court first determined that the designated evidence established compliance with FMVSS 208, which entitled the manufacturer to a presumption that the airbag was not defective.²⁴⁷ However, the *Cansler* court held that the plaintiff designated evidence of a sufficient quality to rebut the presumption.²⁴⁸ The mechanic's skilled lay opinion about the extent of damage to the car and the plaintiff's testimony about speed at impact, combined with passages in the car's owner's manual concerning the circumstances under which the airbag should inflate (moderate to severe frontal or near-frontal crashes) was sufficient "circumstantial evidence" to support the inference that the airbag was defective because it did not deploy despite the presence of all the necessary elements outlined in the owner's manual.²⁴⁹ Accordingly, the court held that the presumption had been rebutted.²⁵⁰

V. DEFENSES

A. *Use With Knowledge of Danger (Incurred Risk)*

Indiana Code section 34-20-6-3 provides that "[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured."²⁵¹ Incurred risk is a defense that "involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk."²⁵² At least one Indiana court has held in the summary judgment context that application of the incurred risk defense requires evidence without conflict from which "the sole inference to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that

244. *Id.*

245. *Id.*

246. *Id.* at 705.

247. *Id.*

248. *Id.* at 706.

249. *Id.* at 707.

250. *Id.*

251. IND. CODE § 34-20-6-3 (1998).

252. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999).

risk.”²⁵³ This survey article does not address in detail any incurred risk cases.²⁵⁴

B. Misuse

Indiana Code section 34-20-6-4 provides that “[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.”²⁵⁵ Knowledge of a product’s defect is not an essential element of establishing the misuse defense.

The facts necessary to prove the defense of “misuse” many times will be similar or identical to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers²⁵⁶ or the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable,²⁵⁷ or both. Thus, there are in Indiana at least three separate statutory standards that might bar liability when injury results from a set of circumstances related to use that is not reasonably expectable or foreseeable. *Burt v. Makita USA, Inc.*,²⁵⁸ illustrates how a set of facts can be analyzed to deny recovery using Indiana Code section 34-20-4-1(1), Indiana Code section 34-20-4-3, or Indiana Code section 34-20-6-4. Recall that the *Burt* case is the one in which the plaintiff was injured by a circular saw’s blade guard. The district court held that there was

no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly

253. *Id.* (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 940 (Ind. Ct. App. 1994)).

254. Indiana courts have decided some important incurred risk cases in the last few years. *See, e.g., Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no basis for the incurred risk defense under the facts of that case; plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform); *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999) (holding that because the plaintiffs did not adequately specify the basis of their claim, the court was unclear whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers’ injuries resulted and the court was unable to determine the applicability of the incurred risk defense); *Cole v. Lantis Corp.*, 714 N.E.2d 194 (Ind. Ct. App. 1999) (finding that because plaintiff’s job necessarily entailed moving containers across gap between aircraft and aircraft loading equipment and his apparent belief that he had to somehow find a way to work around the known danger posed by the gap, the majority concluded that whether plaintiff voluntarily incurred the risk of falling through the gap is a fact question for the jury’s resolution).

255. IND. CODE § 34-20-6-4 (1998).

256. *Id.* § 34-20-4-1(1).

257. *Id.* § 34-20-4-3.

258. 212 F. Supp. 2d 893 (N.D. Ind. 2002).

attached. To the contrary, the evidence suggests that the accident was unforeseeable, caused by a very unusual set of factual circumstances.²⁵⁹

Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law.²⁶⁰ That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met and the defense of "misuse" in Indiana Code section 34-20-6-4 had been established.²⁶¹

In addition to the several other product liability issues addressed in the opinion, the court in *Morgen v. Ford Motor Co.*,²⁶² dealt with a jury instruction about misuse. *Morgen* is a pre-IPLA case (accrual in 1993), in which Morgen was severely injured in a rear-end collision while riding in the rear seat of a Ford Escort.²⁶³ He sued Ford, claiming that the Escort was defective and that Ford failed to provide reasonable warnings.²⁶⁴ Morgen's experts claimed that the structural design of the car reduced occupant survival space or headroom.²⁶⁵ Ford argued that Morgen's injuries occurred because of his failure to wear a seatbelt, which Ford contended was a product misuse.²⁶⁶ The trial gave Ford's tendered jury instruction on misuse, after which the jury returned a general verdict for Ford.²⁶⁷ The Indiana Court of Appeals reversed, determining that a misuse instruction was improper because there is no common law or statutory duty for an occupant of a vehicle to wear a seat belt, because there is no statutory duty for a backseat passenger to wear a seat belt, and because it is foreseeable that automobile passengers may not wear seat belts.²⁶⁸

The Seventh Circuit's opinion in *Chapman v. Maytag Corp.*²⁶⁹ also must be considered in connection with the "misuse" defense. Recall that the parties in *Chapman* did not dispute that the stove involved had a manufacturing defect in that it contained a wire that had become pinched between a metal housing cover and the metal back of the stove during the assembly process.²⁷⁰ Maytag nevertheless argued that the stove was delivered with a host of warnings advising consumers that the failure to plug the range into a properly grounded three-hole receptacle in compliance with local rules and the NEC could result in a shock hazard.²⁷¹ The decedent had incorrectly installed the outlet into which the stove was plugged, which rendered that outlet devoid of a grounding wire, thus

259. *Id.* at 898.

260. *Id.* at 899.

261. *Id.* at 898.

262. *See supra* note 153.

263. *Id.* at 139.

264. *Id.*

265. *Id.* at 139-40.

266. *Id.* at 140.

267. *Id.*

268. *Id.* at 142.

269. 297 F.3d 682 (7th Cir. 2002).

270. *Id.* at 685.

271. *Id.* at 684-85.

contrary to the foregoing product warnings.²⁷² Maytag argued that plugging the stove into an inadequate outlet contrary to label warnings amounted to a misuse of the product that completely barred plaintiffs' action against it.²⁷³

The Seventh Circuit determined that the district court did not abuse its discretion in determining that any "misuse" of the product falls within the scope of the IPLA's definition of "fault."²⁷⁴ Because a jury is directed to compare all "fault" in a case, the district court did not abuse its discretion in determining that the IPLA requires "misuse" be part of the comparative fault analysis and not a complete defense.²⁷⁵

The Seventh Circuit also determined that the district court did not abuse its discretion in determining that the decedent's failure to heed Maytag's warnings, even if assumed adequate, would not constitute "misuse."²⁷⁶ The fundamental reason why the Seventh Circuit deferred to the district judge's discretion on this point appears to be the fact that the case involved a manufacturing defect and that failure to follow label warnings could not be considered a "misuse" in the presence of such a manufacturing defect.²⁷⁷ Indeed, the Seventh Circuit noted that Maytag cited in support of its position only Indiana cases that did not involve manufacturing defects.²⁷⁸

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides that "[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of the physical harm where the modification or alteration is not reasonably expectable to the seller."²⁷⁹

Although this survey article does not address in detail any modification or alteration cases, practitioners should recognize that the alteration defense is also incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1.²⁸⁰ Indeed, Indiana Code section 34-20-2-1 provides that

a person who sells, leases, or otherwise puts in to the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user

272. *Id.* at 685.

273. *Id.* at 688.

274. *Id.* at 689.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. IND. CODE § 34-20-6-5 (1998).

280. *Id.* § 34-20-2-1.

or consumer or to the user's or consumer's property if . . . (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.²⁸¹

Accordingly, if a claimant cannot establish the absence of a substantial alteration, or if a defendant conclusively proves that the product underwent some of *substantial alteration* between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief as a threshold matter.

D. Other Defenses

Although it does not directly address any provisions of the IPLA, Chief Judge McKinney's order in *Miller v. Honeywell International, Inc.*²⁸² affirms another defense available to product manufacturers in Indiana under certain limited circumstances. In *Miller*, the manufacturer of an oil debris detection system ("ODDS") incorporated into an Army helicopter that crashed at Camp Atterbury filed a motion for summary judgment based on the "military contractor defense" in a wrongful death action in which the plaintiffs asserted that the ODDS was defectively designed.²⁸³ The court applied the "military contractor defense" recognized by the United States Supreme Court in *Boyle v. United Technologies Corp.*²⁸⁴ Chief Judge McKinney granted summary judgment concluding that the manufacturer of the ODDS had established each of the three required elements of the military contractors defense: the United States Army approved reasonably precise specifications for the equipment; the equipment conformed to those specifications; and the contractor had warned the United States about any dangers known to the contractor but not to the United States.²⁸⁵

VI. COMPARATIVE FAULT AND NONPARTY ISSUES

The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. The Indiana General Assembly made it clear that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant.²⁸⁶

The IPLA now requires the trier of fact to compare the fault of the person suffering the physical harm, as well as the fault of all others whom caused or

281. *Id.*

282. 2002 U.S. Dist. LEXIS 20474 (S.D. Ind. Sept. 30, 2002).

283. *Id.* at **2-4.

284. 487 U.S. 500, 503-06 (1988).

285. *Miller*, 2002 U.S. Dist. LEXIS 20474, at **71-72. The ODDS had been subjected to over five years of scrutiny and testing by U.S. Army engineers who made discretionary decisions as to all three alleged design defects based on their own tests. *See id.* at **49-52.

286. IND. CODE § 34-20-7-1 (1998).

contributed to cause the harm.²⁸⁷ The statute requires that the trier of fact compare such fault “in accordance with” Indiana Code sections 34-51-2-7 to -9.²⁸⁸ The IPLA mandates that

[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.²⁸⁹

A. Are the Defenses “Complete”?

Incurred risk, misuse, and alteration/modification all were “complete” defenses to IPLA claims before the 1995 amendments because they served to relieve a defendant of liability, if the defendant was able to plead and prove any one of them.²⁹⁰ In light of the introduction of fault allocation principles into product liability cases in Indiana in 1995, there appears to be some question about whether the statutory defenses remain complete defenses or whether they are simply arguments that affect the level or percentage of fault to be placed upon a particular claimant.

That the alteration or modification defense is “complete” may be the least controversial because the alteration defense is incorporated directly into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1.²⁹¹ Indeed, Indiana Code section 34-20-2-1 provides that

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous . . . is subject to liability for physical harm caused by that product . . . if . . . (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.²⁹²

Accordingly, the “alteration” defense is “complete” by the very statute that imposes product liability in Indiana as a threshold matter. If a claimant cannot establish that the product was not substantially altered or if a defendant conclusively proves that the product underwent some of “substantial alteration” between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief.

287. *Id.* § 34-20-8-1(a).

288. *Id.* §§ 34-51-2-7 to -9.

289. *Id.* § 34-20-8-1(b).

290. *E.g.*, *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715 (Ind. Ct. App. 1995) (holding incurred risk a complete defense to strict product liability claims); *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984) (holding nonforeseeable misuse a complete defense to product liability claim); *Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994) (holding modification or alteration a complete defense to certain product liability actions).

291. IND. CODE § 34-20-2 (1998).

292. *Id.*

Incurred risk may remain a complete defense, although that question seems to be the most intriguing. The Indiana General Assembly amended what is now Indiana Code section 34-20-6-3(3) to eliminate the word "unreasonably" from the phrase that previously read "nevertheless proceeded 'unreasonably' to make use of the product."²⁹³ The language used is significant because it lends support for the proposition that incurred risk is not subject to fault apportionment.²⁹⁴ In addition, the definition of "fault" for purposes of Indiana's Comparative Fault Act²⁹⁵ includes "incurred risk," whereas the definition of "fault" for purposes of the IPLA does not.²⁹⁶ The IPLA "fault" definition does, however, include the "[u]nreasonable failure to avoid an injury or to mitigate damages."²⁹⁷ Whether that language, in effect, means the same thing as "incurred risk" seems to be an open question.

At least one Indiana appellate decision seems to provide support for the proposition that incurred risk remains a complete defense in Indiana. In *Hopper v. Carey*,²⁹⁸ the Indiana Court of Appeals recognized that IPLA claims are subject to specifically enumerated defenses, including the "incurred risk"²⁹⁹ defense. The *Hopper* court pointed out that "even if a product is sold in a defective condition unreasonably dangerous, recovery will be denied an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily [incurred] the risk."³⁰⁰ The court makes no mention of comparing fault if there is a determination that the plaintiff had actual knowledge and appreciated the specific danger involved.

There is a conflict between two recent Indiana Court of Appeals panels and one federal decision with respect to whether "misuse" is a complete defense. The two cases that have held the defense of misuse under the IPLA to be a

293. *Id.* § 34-20-6-3(3) (formerly IND. CODE § 33-1-1.5-4(b)(1) (repealed 1998)).

294. See Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 1000 (1996).

295. IND. CODE § 34-51-2 (1998).

296. Compare *id.* § 34-6-2-45(a), with *id.* § 34-6-2-45(b). Unlike the definition used for cases governed by the Comparative Fault Act, the IPLA "fault" definition does not include the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." *Id.* § 34-6-2-45(b). For purposes of the IPLA, the legislature defined "fault" to mean: "an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others." The term includes "[u]nreasonable failure to avoid an injury or to mitigate damages" and "[a] finding under IC 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller." *Id.* § 34-6-2-45(a).

297. See *id.*

298. 716 N.E.2d 566 (Ind. Ct. App. 1999).

299. *Id.* at 570.

300. *Id.* at 576 (quoting *Koske v. Townsend Engineering Co.*, 551 N.E.2d 437, 441 (Ind. 1990)).

“complete” defense are *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*³⁰¹ and *Morgen v. Ford Motor Co.*³⁰² Indiana courts view the “misuse” defense as “complete” because the existence of facts giving rise to the defense amount to an unforeseeable intervening cause that relieves the manufacturer of liability as a matter of law.³⁰³ The federal decision, *Chapman v. Maytag Corp.*³⁰⁴ held that the district judge did not abuse his discretion in determining that any “misuse” of a product falls within the scope of the IPLA’s definition of “fault.”³⁰⁵ Because a jury is directed to compare all “fault” in a case, the district court did not abuse his discretion in determining that the IPLA requires “misuse” be part of the comparative fault analysis and not a complete defense.³⁰⁶

The debate is interesting. To be sure, the statutory definition of “misuse” seems to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser’s conduct. That would tend to explicitly demonstrate that “misuse” is not “fault.” The district judge in *Chapman* recognized as much. As the district judge also recognized, however, it is also true that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement and a plaintiff’s misuse arguably falls within Indiana Code section 34-6-2-45(a)’s definition of “fault.”³⁰⁷ However, that the General Assembly may not have overtly indicated that it intended to exempt misuse from the scope of the comparative fault requirement does not necessarily mean that it is exempted. After all, it would seem equally as likely that the legislature’s silence on the matter would indicate an implicit recognition that the “complete” nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles vis-a-vis defendants and non-parties.

B. Non-Party Practice

Recent case law holds that Indiana Code section 34-51-2-16 governs the amendment of a pleading to assert a nonparty defense in a product liability case.³⁰⁸ Parties must plead the nonparty defense with “reasonable promptness.”³⁰⁹ In *McClain v. Chem-Lube Corp.*,³¹⁰ a welder sued the manufacturer and seller of an anti-spatter compound, claiming injuries as a result of exposure to fumes and vapors associated with use of the compound. Among

301. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

302. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *reh’g denied* 2002 Ind. App. LEXIS 791 (Ind. Ct. App. Apr. 22, 2002), *trans. granted, opinion vacated by* 2002 Ind. LEXIS 852 (Ind. Nov. 1, 2002).

303. *Id.*

304. 297 F.3d 682 (7th Cir. 2002).

305. *Id.* at 689.

306. *Id.*

307. IND. CODE § 34-6-2-45(a) (1998).

308. *Id.* § 34-51-2-16.

309. *Id.*

310. 759 N.E.2d 1096 (Ind. Ct. App. 2001).

the many issues in that case was one that involved the nonparty defense.³¹¹ The manufacturer named the welder's employer as a non-party by way of a motion to amend pleadings six months after the expiration of the statute of limitations.³¹² The *McClain* court concluded that the manufacturer defendant had ample opportunity before the expiration of the limitations period to name the employer as a nonparty, and that its failure to do so resulted in the manufacturer's inability to assert a nonparty defense against the employer.³¹³ Thus, the *McClain* court held that the trial court abused its discretion in allowing the manufacturer to amend the pleadings.

In *Bondex v. Ott*,³¹⁴ four defendant product manufacturers appealed an interlocutory order by the trial court that precluded them from naming several bankrupt entities as nonparties.³¹⁵ The trial court had concluded that allowing the defendants to name bankrupt entities as nonparties would be a violation of the automatic stay provision of the Bankruptcy Code found at 11 U.S.C. § 362.³¹⁶ The Indiana Court of Appeals reversed holding that an allocation of fault to a nonparty through the comparative fault provision of the IPLA was not an imposition of liability against the nonparty.³¹⁷ The appellate court reached its conclusion by applying the language of Indiana Code section 34-51-2-8 which makes clear that a jury may assess a judgment for damages against only defendants, not against non-parties.³¹⁸

CONCLUSION

The 2002 survey period was yet another one in which Indiana practitioners challenged each other and Indiana courts to define and refine Indiana product liability law in light of the 1995 amendments to the IPLA. The professional integrity, spirit, and scholarship exhibited as part of that process makes us all proud to be advocates.

311. *Id.* at 1104-06.

312. *Id.* at 1104-05.

313. *Id.* at 1106.

314. 774 N.E.2d 82 (Ind. Ct. App. 2002).

315. *Id.* at 83.

316. *Id.* at 84.

317. *Id.* at 87.

318. *Id.* at 86.

SURVEY ON THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

There were several significant disciplinary cases decided by the Indiana Supreme Court during the survey period. Most of the selected cases involve lawyers' duties to others outside the attorney-client relationship. This is a theme commented on in prior survey articles on professional responsibility.¹ It should be common knowledge among lawyers that they owe a high professional duty to their clients in carrying out representations on their behalf. The significance of the selected cases herein is their continued illumination of the broader duties as members of the bar than only as advocates on behalf of their clients. The duty to clients is, to be sure, the most important duty lawyers have. It is not, however, their only duty.²

I. THE LIMIT OF ADVOCACY

During the survey period, the supreme court addressed one case involving the subject of judicial criticism. In *In re Wilkins*,³ the court imposed a thirty-day suspension on a lawyer for violating Indiana Professional Conduct Rule 8.2(a).⁴ In *Wilkins*, the lawyer represented a client insurance company before the Indiana Court of Appeals. The case that gave rise to this disciplinary action was *Michigan Mutual Insurance Co. v. Sports, Inc.*⁵ After the court of appeals affirmed the trial court's verdict, the respondent filed a petition to transfer the case, along with a brief, in the Indiana supreme court. The court noted that some of the arguments in the brief were heavy handed, but did not constitute a violation of the Rules of Professional Conduct. Within the brief, there was a footnote that provided, "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."⁶ A majority of the supreme court found that the footnote constituted a violation

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1. See, e.g., Charles M. Kidd, *Survey on the Law of Professional Responsibility*, 34 IND. L. REV. 921 (2001).

2. See, e.g., IND. PROF'L CONDUCT R. 8.3 (describing a lawyer's duty to report misconduct involving another lawyer to the disciplinary authority).

3. 777 N.E.2d 714 (Ind. 2002).

4. The rule provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

5. 698 N.E.2d 834 (Ind. Ct. App. 1998).

6. *In re Wilkins*, 777 N.E.2d at 715-16 (quoting Brief in Support of Appellant's Petition to Transfer at 1 n.2).

of the rule as charged and noted that “[w]ithout evidence, such statements should not be made anywhere. With evidence, the should be made to the Judicial Qualifications Commission.”⁷ The court found the respondent lawyer’s conduct was aggravated due to his lack of remorse.⁸ Although he sent letters of apology to the judges affected, the court found that his apologies gave a strong indication that he was sorry only for the negative consequences he suffered because of his own actions.⁹

The opinion contained two dissenting opinions. Both Justices Sullivan and Boehm would have found no violation of the Rules of Professional Conduct. Justice Sullivan found that the respondent’s comments in the footnote constituted “rhetorical hyperbole” that was protected by the First Amendment of the United States Constitution. Justice Boehm’s dissent, meanwhile, characterized the footnote as “tasteless,” but not warranting disciplinary sanction. He noted,

I do not agree with the respondent’s contentions in the offending footnote, and I certainly do not condone the respondent’s choice of language in expressing them. Moreover, such intemperate language is very poor advocacy, distracting as it does from the points that are sought to be made. I nevertheless do not believe these opinions are sanctionable. Indeed, I would find them within a broad range of protected fair commentary on a matter of public interest.¹⁰

Post-opinion, the respondent moved for rehearing and, at the same time, sought the recusal of Justice Rucker. The motion for recusal was based upon the purportedly unnoticed fact that Justice Rucker had previously served on the court of appeals. In fact, that service included sitting as one of the judges on the *Michigan Mutual v. Sports, Inc.* case underlying this disciplinary action. Although then Judge Rucker concurred only in the result of the underlying opinion, he believed the nexus close enough to warrant his recusal from further consideration of the *Wilkins* disciplinary action. In a separate opinion issued January 3, 2003, Justice Rucker explained his decision to recuse in *In re Wilkins*.¹¹ He was firmly convinced that he dealt with the respondent’s disciplinary action in a fair and impartial manner. He also noted that he would not have been especially concerned about the respondent’s criticism of the opinion. He recognized, however, that his view of his impartiality was not the sole consideration: “Nonetheless, I acknowledge that the question is not whether I personally believe I have been impartial. Rather, it is whether a “reasonable person aware of all the circumstances” would question my impartiality.” At the time of the recusal, the case had been decided by the published opinion described above. If it was pending before the supreme court at all, it was awaiting a decision on the balance of the respondent’s petition for rehearing. From that

7. *Id.* at 717.

8. *Id.* at 718.

9. *Id.*

10. *Id.* at 720.

11. 780 N.E.2d 842 (Ind. 2003).

perspective, had a majority (or an even split of the remaining four justices) of the court decided to deny the petition for rehearing, the previously decided opinion would stand as the final decision in the case.

The supreme court, however, granted rehearing in the published opinion in *In re Wilkins*.¹² This opinion on rehearing was decided by a four member supreme court due to the loss of Justice Rucker on Wilkins' successful motion for recusal. In this latest opinion from the court, the remaining four justices split as they had in the original opinion with two of the justices believing that the language of the offending footnote was worthy of sanction under Indiana's Rules of Professional Conduct. Those justices, however, relented from their belief that the respondent should be suspended for thirty days and instead wished to impose a public reprimand to conclude the matter. The compromise on sanction, however, did not lessen their belief in the overall rightness of their decision.

His petition requests reconsideration of (1) the application of the First Amendment protection to the offending remarks, and (2) the appropriate sanction to be imposed.

We dispose of these requests largely on the difference between sound advocacy and defamation. Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge's integrity.¹³

The court's composition, however, presented an interesting procedural dilemma. Because of Justice Rucker's recusal, two of the justices believed Wilkins violated the rule and two did not believe his conduct to be a violation. The will was present to reduce Wilkins' sanction from a suspension to a public reprimand, but the prior voting alignment on the court now made it impossible to change the court's October 29, 2002, order. In a separate opinion, Justice Boehm elected to concur in the result only in order to reduce the penalty imposed. He explained his decision to concur in the sanction only,

The votes of the Chief Justice and Justice Dickson are to grant rehearing as to the sanction only, and to impose a public reprimand. Justice Sullivan and I would vote for no sanction at all. But if neither of us joins in the result reached by Justice Dickson and the Chief Justice, we have no majority to grant rehearing as to any aspect of the original opinion and Wilkins' thirty-day suspension stands. Lewis Carroll would love that result: half the Court believes no sanction is appropriate, and half would impose a small sanction, so the result is a major penalty. Only those who love the law could explain that to their children. To free parents everywhere from that burden, I concur in the result of granting rehearing as to the sanction and reducing it to a public reprimand.¹⁴

12. 782 N.E.2d 985 (Ind. 2003).

13. *Id.* at 986.

14. *Id.* at 988.

The final result in the Indiana Supreme Court, therefore, is the imposition of a public reprimand. As of this writing, the case was pending on a writ of certiorari to the Supreme Court. The primary issue for seeking *certiorari* is the possibly impermissible restriction on expression by Indiana Professional Conduct Rule 8.2(a). The U.S. Supreme Court has not previously reviewed this kind of restriction on lawyer speech despite the existence of this type of regulation for many years. Indeed, many state high courts and federal courts have passed upon Rule 8.2(a) or its counterpart in various jurisdictions, but the topic has not been addressed by the U.S. Supreme Court.

II. FORBIDDEN COMMUNICATION BY LAWYERS

Lawyers are forbidden from communicating with certain individuals involved in the legal system at certain times. Judges, opposing parties and, in some cases, witnesses¹⁵ are protected from communications by lawyers who are acting in a representative capacity in certain matters. At least as far back as Indiana's Code of Professional Responsibility, lawyers have been forbidden from contacting an opposing party that was represented by counsel. Since the Indiana Supreme Court adopted the Rules of Professional Conduct in January 1987, the prohibition on contacting a represented party (or, in the vernacular, "bypassing" opposing counsel) has been found in Indiana Professional Conduct Rule 4.2. Indiana's formulation of the rule is identical to that originally proposed in the ABA's Model Rules of Professional Conduct. In essence, the rule prohibits one lawyer from contacting a represented party without the second lawyer's express permission. Over the years, lawyers have been the subjects of disciplinary action for violating this provision. Those disciplinary actions have generally been for conduct that was not merely negligent contact (where, for example, a lawyer might contact a defendant at the early stages of litigation before receiving any information that the party was represented), but rather for conduct that was either knowing or intentional.

It was under these circumstances that the disciplinary action of *In re Baker*¹⁶ began. There, the respondent lawyer represented the principal in a pool construction and supply business that was contemplating reorganization. During the reorganization, the construction business was split apart from the pool supply business and the new entities' principal was the former business partner of Baker's client. The former partner was represented by another lawyer, Deckard, who also represented Baker's client in certain personal matters unrelated to the division of the pool business. During the reorganization, Baker's client believed that Deckard represented his interests with respect to indemnities, guaranties and liabilities to both principals under the bonding arrangements.

After the reorganization, the construction business filed suit against a school

15. The Comment to Indiana Professional Conduct Rule 4.2 makes clear that when a party is an organization (like a corporation) there are restrictions on the people within that organization whom the lawyer can talk to about the matter under investigation.

16. 758 N.E.2d 56 (Ind. 2001).

corporation for a pool project and also sued the bonding company on the job. Deckard entered his appearance for the bonding company. Baker believed that Deckard had a conflict of interest in representing the bonding company based upon Deckard's prior dealing with Baker's client. Baker wrote to Deckard and explained the conduct and why he believed that Deckard should be disqualified from the representation of the bonding company. Without Deckard's consent, Baker sent a copy of the letter directly to the bonding company. He also sent a second letter to the bonding company in which he set out his client's legal position on the indemnification agreements, discussed his perception that Deckard had a conflict of interest and *demand*ed that the bonding company terminate their attorney-client relationship with Deckard. Baker did not notify Deckard of this second letter and did not provide him with a copy.

The respondent lawyer and the Disciplinary Commission agreed that the supreme court should dispose of the case on the basis of a public reprimand. The court assented and did so on the basis of prior precedent in this area.

Past violations of Prof.Cond.R. 4.2 or its predecessor have resulted in public admonishment. [See, e.g., *Matter of Syfert*, 550 N.E.2d 1306 (Ind. 1990)] (communicating with represented opposing party in legal dispute without other lawyer's knowledge and consent, and circumventing negotiations with opposing lawyer in order to pressure opposing party to settle on terms less favorable than those previously negotiated by party's lawyer); [*Matter of Mahoney*, 437 N.E.2d 49 (Ind. 1982)] (intentionally and knowingly disregarding expressed wishes of another attorney in conversing with that attorney's client on subject matter which affected other attorney's client's vital interest violated DR 1-102(A)(5), DR 7-104(A)(1)). In light of precedent and the parties' present agreement, we find that a public reprimand is appropriate in this case.¹⁷

As noted earlier, the court focused on the mental element associated with the misconduct. The fact that the respondent lawyer engaged in the conduct in a knowing or intentional manner was an important part of the court's analysis in imposing discipline on the lawyer. Observe also that the court did not automatically accept the sanction tendered just because the respondent lawyer and the Disciplinary Commission agreed to it. The court found Baker's conduct to be mitigated by the fact that he was remorseful for contacting the other lawyer's client. Certainly remorse is a well-recognized fact in mitigation in disciplinary action generally. In fact, it is one of the required elements that suspended lawyers must demonstrate when they go through the reinstatement process. The court's consideration of remorse was tempered by their consideration of the offered fact in aggravation that Baker engaged in the misconduct and sought to gain an unfair advantage in the litigation through his letter to the opposing party. As mentioned earlier, the mental state of the respondent lawyer when engaging in the misconduct is an important factor in evaluating the severity of the sanction.

17. *Id.* at 58.

Also during the survey period, the court imposed a public reprimand in its decision in *In re Capper*.¹⁸ The lawyer in *Capper* faced a series of circumstances that seems, at first blush, to be somewhat expected in domestic relations representations. In the first count, the respondent lawyer was a partner in a firm in which one of the associates represented the wife in a dissolution case. After a short time, she terminated the associate's representation and hired another lawyer outside the firm. Two years after the final decree was entered, the wife initiated a contempt action against her former husband for failing to pay child support. The husband consulted with the respondent lawyer who, in turn, notified the wife's new lawyer that he was representing her ex-husband. The respondent did not obtain the wife's consent to represent her ex-husband. This was a necessary step because of the firm's prior representation of the wife. The respondent's misconduct fell under the rarely used rule imputing a conflict of interest where one member of a law firm represents a client, no one else in the law firm may represent an adverse party without the consent of the first client.¹⁹ Said another way, because the firm's associate could not represent an adverse party, no one else in the firm could represent the adverse client either.

In the second count, the respondent represented the ex-husband in post-dissolution matter centering on moving the children out of their present school district. A lawyer also represented the former wife. Although no hearing was held on the issue of moving the children, several months later, the father told the respondent lawyer that a new dispute had arisen and that he agreed with the former wife to physical custody of one of the children pending resolution of that dispute. He directed the lawyer to draft an agreement immediately so the children could be enrolled in the appropriate schools. He also advised the respondent lawyer that the ex-wife was not going to use a lawyer in order to save money. The respondent lawyer then drafted the agreement without contacting opposing counsel. Both parties signed the agreement when it was returned and thereafter filed with the court. The wife, of course, still viewed herself as represented by her own lawyer and the respondent lawyer did not investigate that circumstance before relying on his client's assertions.

In the third count of *Capper*, the respondent lawyer again represented the former husband in a dissolution matter. *Capper* was served with interrogatories and requests for production regarding the husband's financial status. The respondent lawyer did not respond to these requests and thereafter, the client and his ex-wife appeared in the respondent lawyer's office in expectation of settling the case. The ex-wife expressed her dissatisfaction with her lawyer and that she had terminated his services. Thereafter, the respondent lawyer submitted a signed settlement agreement to the court with opposing counsel's participation even though he was still counsel of record. The opponent was notified and the

18. 757 N.E.2d 138 (Ind. 2001).

19. Indiana Professional Conduct Rule 1.10 provides that "(a) While lawyers are associated in a firm, none of them shall represent a client if he knows or should know in the exercise of reasonable care and diligence that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.8(k), 1.9 or 2.2." These cited rules prohibit conflicts of interest.

agreement was eventually accepted, but the respondent lawyer was still held to have violated the rule because of his communication directly with a represented opposing party to the dissolution. The supreme court recognized that there was no harm to the parties involved, but expected their opinion in *Capper* to serve as a vivid reminder that lawyers should independently verify that opposing parties wishing to communicate directly with them are in fact not represented by counsel, especially where the lawyer knows that the party had previously been represented in the matter.

III. FEE ISSUES

Disputes over fees between lawyers and their clients are not uncommon. Those that are not resolved informally are often resolved through litigation. The Rules of Professional Conduct only require that a lawyer's fee be reasonable and provide some of the factors that go into the determination of reasonableness.²⁰ Certainly not every client complaint about a fee merits disciplinary action. That is reserved for those cases in which the lawyer's fee can be proved unreasonable by clear and convincing evidence. Such was the case in *In re Ellis*²¹ in which a client drove after consuming alcohol and seriously injured two pedestrians in a crosswalk. The client (who had a prior conviction for operating a vehicle while intoxicated) paid his lawyer, Michael T. Ellis \$25,000. In a relatively short period of time, the lawyer worked out a plea agreement wherein the client would be convicted of misdemeanor Operating a Vehicle while Intoxicated and sentenced to home detention. The client eventually sued the lawyer to return a portion of the fee and a settlement was worked out between the parties.

In keeping with a settlement worked out between the Disciplinary Commission and the respondent lawyer, the disciplinary action was settled on the basis of a public reprimand.²²

IV. MISCONDUCT PRIOR TO ADMISSION TO THE BAR

Rare indeed are cases that involved post-admission disciplinary action for misconduct that occurred pre-admission and was not reported on the lawyer's application to take the Indiana bar examination.²³ Such was the case, however,

20. Indiana Professional Conduct Rule 1.5(a) requires that "A lawyer's fee shall be reasonable." Some of the factors discussed later in the rule include the novelty of the matter for which the lawyer was hired or the time and skill required to complete the task.

21. 766 N.E.2d 350 (Ind. 2002).

22. Use of the public reprimand for disposing of cases involving primarily fee disputes is not uncommon. See, e.g., *In re Benjamin*, 718 N.E.2d 1111 (Ind. 1999). Even minor misconduct that accompanies a fee dispute can result in a significant increase in the punishment for cases that involve excessive fee claims by lawyers. See, e.g., *In re Heamon*, 622 N.E.2d 484 (Ind. 1993).

23. The few prior cases involving such conduct are: *In re Charos*, 585 N.E.2d 1334 (Ind. 1992); *In re Redding*, 672 N.E.2d 76 (Ind. 1996); *In re Lucas*, 672 N.E.2d 934 (Ind. 1996); and *In re Verma*, 691 N.E.2d 1211 (Ind. 1998). In *Verma*, the lawyer was disbarred for a pervasive deceit that included forging documents to support his claims on his application.

in *In re Rodriguez*²⁴ wherein a lawyer was suspended from the bar for ninety days. In this case, the respondent lawyer submitted an application to the Indiana Board of Law Examiners in April 1991 that was substantially incomplete. Although he disclosed that he had attended the University of Florida and Ohio Northern University on his application, he did not reveal that he had attended the University of Miami and the Nova University College of Law. He had been academically dismissed from both institutions.

In its opinion in the disciplinary action, the supreme court stated unequivocally that a suspension from the bar for ninety days was the minimum sanction it would approve in future cases involving such conduct. The implication to be drawn from the opinion is the supreme court justices view admission on false or deliberately incomplete information to be especially reprehensible. A ninety-day suspension from the bar is not an inconsequential sanction and the court appears ready to use it in appropriate cases of falsity or honesty problems involving candidates to the Indiana bar.

V. CONTEMPT OF THE SUPREME COURT

It would seem, *a fortiori*, that lawyers would not engage in the practice of law after they are suspended or disbarred. This is not, however always the case. Recently, the supreme court ordered a suspended lawyer be incarcerated for fifteen days in *In re Pope*.²⁵ The sanction was imposed in *Pope* because the lawyer maintained a presence in another lawyer's office and engaged in acts that included drafting documents. Furthermore, the court considered the lawyer's acts to be openly defiant of its authority and prior suspension order.²⁶

Pope is not particularly remarkable misconduct as contempt cases go. It seems, however, that the whole genre of contempt cases are remarkable in that they involve lawyers who flout the supreme court's authority and who continue to engage in the acts that, in many cases, got them in trouble in the first place. Past cases include, *In re Crumpacker*,²⁷ *In re Baars*,²⁸ and *In re Lowry*,²⁹ among others.

VI. PERSONAL MISCONDUCT

In *In re Pacior*³⁰ the respondent lawyer received a public reprimand for engaging in conduct, *inter alia*, that constituted a conflict of interest. In this

24. 753 N.E.2d 1289 (Ind. 2001).

25. 772 N.E.2d 405 (Ind. 2002).

26. *Id.*

27. 431 N.E.2d 91 (Ind. 1982).

28. 683 N.E.2d 555 (Ind. 1997).

29. 760 N.E.2d 170 (Ind. 2001). Although the other cited cases involve lawyers who were originally suspended for disciplinary reasons, *Lowry* involves a lawyer who continued to practice after he was suspended for failing to get the requisite continuing legal education. The lawyer in *Lowry* was fined \$2500 by the supreme court.

30. 770 N.E.2d 273 (Ind. 2002).

case, the lawyer was disciplined in part for expressing a romantic interest in a client he represented a marriage dissolution and personal bankruptcy. His interest manifested itself through romantic notes and cards and, during her office visits, he verbally told her of his desire to engage in a personal relationship with her. Three times he hugged and kissed her during the pendency of her marriage dissolution and bankruptcy. The client, however, declined to enter a personal relationship with the lawyer.

The supreme court imposed a public reprimand on the lawyer for this and other misconduct. The court found that Pacior violated Indiana Professional Conduct Rule 1.7(b)³¹ by continuing to represent the client after expressing and promoting his personal and romantic interest in her. The court also found that Pacior's conduct violated Indiana Professional Conduct Rule 8.4(d) by being prejudicial to the administration of justice.³² This disciplinary action was resolved by settlement with the respondent lawyer on the basis of a public reprimand. The supreme court observed in a footnote,

In the case at bar, it was the respondent's expression of personal and romantic interest in the client that led to the respondent's conflict of interest. Had that expression been manifested in more strenuous fashion, the appropriate discipline would have been more severe. *See, e.g., In re Tsoutsouris*, 748 N.E.2d 856 (Ind. 2001) (30 day suspension for sexual contact with client.)³³

The court's footnote is borne of long experience. Cases of this kind commonly involve some sexual contact with the client: an element completely lacking in *Pacior*. This case recognizes that the lawyer's emotional commitment to a personal relationship with a client is still a violation of the Rules of Professional Conduct. Other conflict of interest cases in this area make clear that having a sexual relationship with a client undoubtedly violates the rules. Some of these other cases also make clear that the emotional aspect of a relationship can be almost completely absent.³⁴ The point being that the lawyer's emotional

31. That rule provides in pertinent part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

IND. PROF'L CONDUCT R. 1.7(b).

32. The full text of that rule provides that "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

33. *In re Pacior*, 770 N.E.2d at 275 n.4.

34. *In re Manson*, 676 N.E.2d 347 (Ind. 1997) (lawyer suspended 6 months for one-time sexual encounter with a domestic relations client); *In re Grimm*, 674 N.E.2d 551 (Ind. 1996) (lengthy sexual relationship with domestic relations client apparently in exchange for legal fees).

involvement in *Pacior* was sufficiently profound to markedly effect the operation of the attorney-client professional relationship. Once that lack of professional detachment is lost, the lawyer has created conflict-of-interest and must discontinue the professional relationship³⁵ or face disciplinary action.

VII. CANDOR TO THE TRIBUNAL

Lawyers understand that their primary professional obligation is to their client, but as the relationship with that client changes, the obligation to the client can become at odds with the lawyer's duties to those outside the attorney-client relationship. Specifically, the duty of candor can really test a lawyer's ethical commitment. Recently, the supreme court has had occasion to opine in two disciplinary cases on lawyers who failed to be candid and truthful to the tribunals before whom they practiced.

In *In re Scahill*,³⁶ the respondent lawyer represented the husband in a marriage dissolution action in which the husband's individual retirement account (IRA) was one of the major assets of the marital estate. The IRA was listed on the client's Financial Declaration at a value of \$72,500 and grew steadily during the pendency of the dissolution case.³⁷ The division of the marital property was contested throughout the course of the proceeding. Without his wife's knowledge, the respondent's client withdrew the IRA in cash. The client told the lawyer that he went to an Indianapolis fast food restaurant with the \$80,500 in cash, fell asleep in the men's restroom and awoke without the money.³⁸ The lawyer did not reveal the loss to the dissolution court and the court awarded the wife a percentage of the sale of the marital residence and almost \$41,000 from the IRA.³⁹ The respondent lawyer, knowing the IRA proceeds no longer existed but still not revealing that fact to the court, successfully argued to reduce the percentage the wife was to receive from the IRA. The trial court reduced the amount to about \$21,000 and ordered the amount paid to the wife within sixty days.⁴⁰

The client, of course, failed to pay the cash to his ex-wife and sought to discharge the obligation by filing a bankruptcy petition. The dissolution court

35. Indiana Professional Conduct Rule 1.16(a) provides in pertinent part that, a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or
- (3) the lawyer is discharged.

36. 767 N.E.2d 976 (Ind. 2002).

37. *Id.* at 978.

38. *Id.* at 979.

39. *Id.*

40. *Id.*

held a hearing on the matter where the client disclosed to the court for the first time that the money had been lost at a fast food restaurant and that he could not pay the money as ordered. Disciplinary charges were thereafter filed against the lawyer and, during the trial phase of the disciplinary case, the hearing officer found that the respondent lawyer had no duty to disclose his client's dissipation of the IRA to the court or his opponent and, therefore, no fraudulent concealment of the asset had occurred. The supreme court reversed that determination, however, and found that the client had committed constructive fraud on the dissolution court.⁴¹ The court made that determination based on a local Marion County court rule that requires a party who files a Financial Declaration form in a dissolution action has an affirmative duty to supplement the form when required. That duty included the duty to reveal that the asset no longer existed.⁴² In other words, the client's failure to amend the Financial Declaration amounted to a knowing concealment under the circumstances of the case. By failing to amend the form, the trial court could not fulfill its duty to divide the marital property in a just and reasonable manner. The respondent lawyer assisted in the act by maintaining a knowing silence, introducing evidence, and making argument to reduce the amount of the IRA award, thereby violating the Rules of Professional Conduct.⁴³ For this misconduct, the lawyer received a public reprimand from the court but it is easy to imagine that under slightly different circumstances, a suspension from the practice of law might be warranted.

In *In re Page*,⁴⁴ the respondent lawyer represented an individual in two matters involving the client's driving privileges. In the first matter, the client was charged in Shelby County with driving while his license was suspended for ten years. In that case, the respondent believed (correctly as it turned out) that Indiana's Bureau of Motor Vehicles records failed to show that the client had received notice of the suspension as required by law.⁴⁵ Meanwhile, the respondent filed a petition for a probationary license in Marion County that recited, among other things, that the client had not violated the terms of his suspension by operating a vehicle.⁴⁶ In response to a direct question from the court commissioner considering the petition, the respondent's client denied that he had driven a vehicle within the preceding nine years. Although the client's answer was untrue and the respondent lawyer knew the answer to be untrue, he did nothing to convince the client to correct his answer and did not disclose the client's deception to the court. The client was later acquitted of the violation in the Shelby County case on the basis that the Bureau of Motor Vehicles notice

41. *Id.*

42. *Id.* at 980.

43. Indiana Professional Conduct Rule 3.3(a)(2) provides that, "[a] lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act against a client by a tribunal."

44. 774 N.E.2d 49 (Ind. 2002).

45. *Id.*

46. *Id.* at 50.

was, in fact deficient.⁴⁷

In his disciplinary action, the supreme court found the lawyer violated Indiana Professional Conduct Rule 3.3(a)(2)⁴⁸ by remaining silent and taking no action in the Marion County case when he knew the client had given false evidence to the commissioner. Citing the *Scahill* case, the supreme court acknowledged there was a tension between the lawyer's duties to maintain client confidences and the lawyer's obligations to be truthful to a tribunal. The court held, however, that doing nothing in the face of this dilemma was not an acceptable option.⁴⁹ The court then imposed a public reprimand on the lawyer.⁵⁰

VIII. UNAUTHORIZED PRACTICE OF LAW

The supreme court was recently called upon to examine the question of what constitutes the unauthorized practice of law (UPL) before the State Board of Tax Commissioners (the Board) in the case of *State ex rel. Indiana State Bar Association v. M. Drew Miller*.⁵¹ In that case, the State Bar Association sought an injunction to prevent Miller from engaging in what it perceived as the unauthorized practice of law before the State Board of Tax Commissioners. During the pendency of the case, the Board promulgated rules to distinguish between the roles of a "tax representative" and an attorney.⁵²

Miller owned a company called Landmark Appraisals, Inc. In essence, Miller would enter into contracts with property owners to examine their property tax assessments to determine whether, in his opinion, the appraised value was excessive and then work with the Board to get the appraisals lowered. In the specific case challenged by the State Bar Association, Miller had raised issues involving the constitutionality of certain assessment statutes and worked to preserve issues for appeal. There, the supreme court agreed that Miller was engaging in acts constituting the practice of law.⁵³ The court determined, however, that Miller's use of court opinions to answer questions about obsolescence or depreciation constituted the practice of law and noted that many non-lawyers may have a greater understanding of those concepts than practicing attorneys.⁵⁴ After reviewing the facts and the statutory scheme created by the Board, the supreme court determined that the Commissioners had created sufficient law to address the concerns that led the State Bar Association to complain in the first place. The court refused to assume that Miller would not comply with the Board's rules and believed that the Board would enforce their

47. *Id.*

48. *Supra* note 40.

49. *In re Page*, 774 N.E.2d at 50.

50. *Id.* at 51.

51. 770 N.E.2d 328 (Ind. 2002).

52. The current version of these rules is found in Indiana Administrative Code tit. 50, 4. 15-5-2 (2001).

53. *Miller*, 770 N.E.2d at 330.

54. *Id.*

rules as written. Although the court agreed that some of Miller's past actions had constituted the unauthorized practice of law, the did not believe it was appropriate to issue an injunction to Miller not to practice before the Board.⁵⁵ The case was dismissed with prejudice.

Chief Justice Randall Shepard, however, dissented from the dismissal. The Chief Justice found that Miller had attempted to use all the tools of the legal profession to represent a client before a state adjudicative body. He also found that Miller's offense was not a victimless crime. By the time one of Miller's client's cases reached the Indiana Tax Court, the client's interests had been damaged because Miller had failed to do the things a lawyer would have done. The Chief Justice did not share the majority's confidence that Miller would abide by the new regulations in light of his prior UPL activities. He observed, "Someone who refuses to recognize his violation is not a plausible risk for future compliance, especially when he has been prosecuted once before, found guilty, and let off scot-free."⁵⁶

CONCLUSION

There were many cases during this survey period over a wide range of topics that were deserving of review by the practicing bar. These cases, many of which are discussed herein, further delineate lawyers' ethical obligation in relative common factual settings. As noted herein, there is a tension between the interests of clients and the lawyer's duties to third parties who are outside the attorney-client relationship. Familiarity with Indiana's Rules of Professional Conduct is certainly a good starting point for lawyers, but it is equally important to have some familiarity with the Indiana Supreme Court cases interpreting those rules. This was not an exhaustive work on cases with professional responsibility issues during the survey period, but it highlights decisions that give important signals to the bar in common representations about the lawyer's duty to practice ethically.

55. *Id.* at 331.

56. *Id.*



FILLING IN THE GAPS: THE CONTINUING EVOLUTION OF PROPERTY LAW IN INDIANA

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In this survey period, October 1, 2001, through September 30, 2002, the state appellate and federal courts tackled a number of discrete issues regarding property law. This Article examines those cases which clarified an existing rule or applied the principles of the common or statutory law to a new situation. The first four sections of this Article correspond with four thematic divisions of property law: (1) relationships between private parties; (2) the creation and enforcement of property interests; (3) land use law; and (4) developments in the common law of property. These sections abstract and analyze a handful of cases which either depart from or clarify existing property law in a significant way. The fifth section describes two significant revisions to the Indiana Code made in the 2002 session of the Indiana General Assembly: the recodification of Title 32 and the Landlord/Tenant Act of 2002. The sixth and final section contains brief summaries of a number of other cases handed down during the survey period which may be of interest to practitioners.

I. RELATIONSHIPS BETWEEN PRIVATE PARTIES

One of the most important practical aspects of property law concerns the rules governing relationships between private parties with respect to real property. The principal relationships which arise are: (1) a buyer and seller of property; (2) a landlord and tenant; (3) a holder of a lien on property and the owner of the property; and (4) holders of competing liens on property. Of course, the contracts that the parties enter into govern the bulk of their relationship, but the rules that govern how those contracts are to be construed and enforced become as much a part of the contract as the words with which they are written.

A. Buyers and Sellers

Buyers and sellers of property typically are most concerned about the practical terms of their transaction—what is to be included with the property, what the price will be, when closing will occur—and that their contracts are carefully prepared with those issues in mind. Unfortunately, the buyer and seller do not typically spend a lot of time thrashing out what will happen if one of them fails to live up to his or her part of the bargain. These issues are usually left to the form of contract used and virtually dismissed as “boilerplate.”

The Indiana Court of Appeals recently had occasion to address the damages

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provision of one of these standard forms of contract in *Rogers v. Lockard*.¹ In that case, the Rogerses recovered a judgment in an unrelated matter for \$2.6 million and decided to use those funds to buy a new house. They entered an agreement with the Lockards to acquire a home in Plainfield, Indiana, and paid an earnest money deposit to the Lockards under the agreement.² As fate would have it, an appeal in the unrelated matter delayed the payment of the judgment and the Rogerses were not able to close upon the property at the time required. After one extension of the closing date, the Rogerses still did not have their money and could not close. The Lockards terminated the agreement, retained the earnest money and eventually sold the home to another buyer some months later.³ Before that sale, however, the Lockards filed suit against the Rogerses for breach of contract and eventually obtained a judgment against them for: (1) the retention of the earnest money deposit, (2) the difference between the actual sales price of the home and the price at which the Rogerses had agreed to buy it under the agreement, and (3) consequential damages. The Rogerses appealed.⁴

The court of appeals expressed concern over the following contractual provision: "If this offer is accepted and the buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be forfeited by the buyer to seller as *liquidated damages*, and seller may pursue any other legal and equitable remedies."⁵ The court noted that liquidated damages clauses are generally enforceable where damages are difficult to ascertain or determine and that the use of the phrase "liquidated damages" generally connotes a limitation on the recovery of a non-breaching party in the event the contract is breached.⁶ Accordingly, the inclusion of the phrase "seller may pursue any other legal and equitable remedies" in the provision created an ambiguity which must be resolved by resort to the parties' intentions when entering into the contract. The court noted that such an inconsistency would cause the damages not to be "truly liquidated, but a forfeiture or penalty,"⁷ which is not favored in the law and is unenforceable.

The court relied on two factors in determining that the provision would not be enforced as a true liquidated damages clause. First, the contract specifically permitted the seller to pursue other remedies.⁸ Thus, notwithstanding that the parties used the phrase "liquidated damages" which would imply a limitation of damages, the inclusion of additional remedies and damages available to the seller

1. 767 N.E.2d 982 (Ind. Ct. App. 2002).

2. The initial offer called for an earnest money deposit of \$1000. The Lockards submitted a counter offer in which the earnest money deposit was to be increased to \$5000. This counteroffer was accepted, but no additional earnest money was ever deposited. *Id.* at 984-85, 993 n.12.

3. *Id.* at 984-85.

4. *Id.* at 986.

5. *Id.* at 989 (emphasis added by the court). This language is in the approved form of purchase agreement of the Indiana Association of Realtors and is in use throughout the State of Indiana. *Id.* at 990 n.8.

6. *Id.* at 990.

7. *Id.*

8. *Id.* at 992.

entirely negates this implication. In so holding, the court brushed aside language in the earlier Indiana Court of Appeals case of *Beck v. Mason*,⁹ which provided that parties to a contract may “stipulate that liquidated damages are supplementary to the rights and remedies of the non-breaching party”¹⁰ by noting that in such a case the damages are not truly liquidated.¹¹ The *Beck* court apparently did not consider the two provisions to be as antagonistic to one another as the court has found in *Rogers*.

The second factor cited by the *Rogers* court is that damages for breach of real estate contracts are not in general particularly difficult to ascertain.¹² Because such damages are not difficult to ascertain, construing the contract to provide for liquidated damages would be inappropriate. The court went on to find that “the Lockards seemed able to adequately ascertain their actual damages.”¹³ This statement is undoubtedly true; however, the Lockards had the advantage of quantifying their damages after the fact. By the time the judgment was entered, the Lockards had already found another buyer for their home and had closed on that sale.¹⁴ All damages they were going to incur had already occurred. It was a simple thing to then add them up. The difficulty in ascertaining damages should be viewed from the perspective of the two parties at the time they entered into the contract. At this time, if the seller were to consider the potential of a breach of the contract by the buyer, the seller would not know how much another buyer would pay for the property, how long the property would sit on the market pending such other sale, whether the seller would have been required to vacate the house at the time of the breach and incur expense for alternative housing or storage, and so on. From that standpoint, damages are anything but certain and are quite difficult to ascertain, as in any other contract.

Nevertheless, the decision in *Rogers* is sound. The phrase “liquidated damages” seems to have lost some of its meaning through inaccurate usage in the residential real estate industry. *Rogers* certainly should cause the industry to correct this ambiguity in the forms utilized in many residential real estate transactions throughout the state. What remains to be seen is how the industry will respond to this case. One might suspect that the forms will be revised by deleting the phrase “liquidated damages” and stating that the deposit may be paid over to and retained by the seller in the event of a breach as an advance on damages the seller has or will incur, with the seller retaining all rights to seek recovery under its other remedies at law and in equity. Meanwhile, purchasers should try to negotiate the true liquidated damages concept into every contract they sign. Unfortunately, *Rogers* may cause purchasers to lose this bargaining alternative because of the supposed ease with which damages for a breach of this type of contract may be determined. To restrict the ability of contracting parties to agree upon true liquidated damages merely because the subject matter of their

9. 580 N.E.2d 290 (Ind. Ct. App. 1991).

10. *Id.* at 294.

11. *Rogers*, 767 N.E. 2d at 992 n.10.

12. *Id.* at 992-93.

13. *Id.* at 993.

14. *Id.* at 985.

contract is real property does not seem to be sound policy.

The United States Court of Appeals for the Seventh Circuit weighed in on a contract interpretation matter in *Allen v. Cedar Real Estate Group*.¹⁵ In this case, Mr. Allen desired to purchase some property in Lake County, Indiana, from Cedar Real Estate Group. Allen submitted his offer to purchase the property on a standard pre-printed form with a separate page entitled "FURTHER CONDITIONS" which stated, in part, that the offer to purchase was subject to certain matters, one of which was Allen's review of particular environmental matters.¹⁶

During Allen's investigation of the property, it was discovered that some environmental contamination was likely present. Allen responded by requesting that Cedar contribute to the remediation of the environmental defects. The parties corresponded for a few months regarding the issues but never came to an agreement. Meanwhile, Cedar solicited other offers to buy the property and eventually gave Allen written notice that the agreement had been terminated.¹⁷ Allen sued Cedar for specific performance of the agreement. The district court granted summary judgment to Cedar, holding that Allen's satisfaction with the environmental condition of the property was a condition precedent to the agreement and, since the condition was never met, no contract between Allen and Cedar had been formed.¹⁸

The court of appeals agreed with the district court. The effect of a condition precedent to a contract is "either a condition . . . must be satisfied before an agreement becomes a binding contract or a condition . . . must be fulfilled before the duty to perform an already existing contract arises."¹⁹ The court found that the unmistakable intent of the parties was that Allen's satisfaction with the environmental condition of the property was a condition precedent to the formation of the contract.²⁰

The court cited two factors in making that determination. First, the language at issue was contained on the separate page entitled "FURTHER CONDITIONS." Second, the language was preceded by the phrase "*this offer to purchase is subject to Purchaser's approval of the following.*"²¹ The court found it vitally important that Allen's choice of language indicated the *offer* was subject to Allen's approval, rather than the agreement of the parties. Accordingly, the only reasonable interpretation of Allen's language regarding approval of the environmental condition of the property was that it was a condition precedent to the formation of the contract.²² Because the condition was never satisfied, no contract ever became effective between the two parties.

Allen also argued that he effectively waived the condition during the course

15. 236 F.3d 374 (7th Cir. 2001).

16. *Id.* at 377-78.

17. *Id.* at 378-80.

18. *Id.* at 380.

19. *Id.* at 381 (citing *Dvorak v. Christ*, 692 N.E.2d 920, 924 (Ind. Ct. App. 1998)).

20. *Id.*

21. *Id.* (emphasis in original).

22. *Id.* at 382.

of the parties' negotiations after the initial report indicated some environmental problems. The court noted that a party in whose favor a condition runs may waive a condition and that such waiver may be made by express communication or by conduct.²³ Cedar, however, failed to present evidence that Allen expressly waived the condition. In addition, nothing he did suggested that he was willing to buy the property notwithstanding the environmental problems which were brought to his attention.²⁴ Allen, having chosen to express the condition as he had, and not having ever backed off from that choice, "now must accept the consequences of his decision."²⁵

The Indiana Supreme Court discussed the effect of a condition precedent and the waiver thereof in *Harrison v. Thomas*.²⁶ Perhaps the most significant aspect of this case is that it vacated a decision of the court of appeals²⁷ which contained an analysis of the waiver of a condition precedent. The supreme court disagreed with that analysis.²⁸

The facts of the case were not in dispute. Harrison sought to build a facility for the Social Security Administration in Richmond, Indiana. He and the Thomases entered into a purchase agreement whereby Harrison would purchase a piece of property owned by the Thomases. Three provisions of the purchase agreement were at issue in the case: (1) Harrison's obligation to purchase the property was contingent upon his ability to purchase a nearby vacant lot; (2) time was of the essence of the agreement; and (3) closing was to occur on July 30, 1998, or within fifteen days after tenant approval, whichever was later.²⁹

The July 30 deadline passed, and Harrison did not close. In fact, it was not until September 11, 1998, that Harrison made any attempt to close the property. On that date, Harrison's broker contacted the Thomases to notify them that Harrison desired to close. The Thomases informed the broker that they were no longer interested in selling the property to Harrison.³⁰ Harrison brought suit for specific performance and the Thomases counterclaimed for damages due to Harrison's breach of the purchase agreement. The trial court entered judgment for the Thomases and Harrison appealed. The court of appeals affirmed the trial court, and the supreme court accepted transfer.³¹

The supreme court rested its affirmation of the trial court on the theory that Harrison did not attempt to close the transaction within a reasonable time.³² The contract failed to include a "drop dead" date by which the closing must have

23. *Id.* at 383 (citing *Salcedo v. Toepp*, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998) and *Parrish v. Terre Haute Sav. Bank*, 431 N.E.2d 132, 135 (Ind. Ct. App. 1982)).

24. *Id.*

25. *Id.*

26. 761 N.E.2d 816 (Ind. 2002).

27. *Harrison v. Thomas*, 744 N.E.2d 977 (Ind. Ct. App. 2001) (*Harrison I*), *vacated*, 761 N.E.2d 816 (Ind. 2002) (*Harrison II*).

28. *Harrison II*, 761 N.E.2d at 819.

29. *Id.* at 818.

30. *Id.*

31. *Id.*

32. *Id.* at 819.

occurred. It merely stated that closing was to occur on July 30, 1998, or within fifteen days after tenant approval, whichever was later. The Thomases argued that the contract could not be construed to permit a closing after July 30, 1998, as it would create an indefinite time to close.³³ The court discounted that argument and held that when the parties to a contract fail to set a time for performance, the "law implies a reasonable time."³⁴ The judgment of the trial court was affirmed because the evidence was sufficient to support a finding that Harrison unreasonably delayed the closing and, therefore, breached the contract.³⁵

Having disposed of the matter, the court went on to discuss the principles upon which the court of appeals affirmed the trial court in order to express its disagreement with the lower court's reasoning. The decision of the court of appeals turns on two conditions in the contract: (1) that Harrison be able to close upon a nearby vacant lot, which was a condition precedent, and (2) that the closing occur by the later of July 30, 1998, or fifteen days after tenant's approval, which was a condition subsequent.³⁶ The court of appeals held that because the condition precedent was solely for Harrison's benefit, only Harrison could have waived the condition. The court, principally relying on *Dvorak v. Christ*,³⁷ held that any waiver of a condition precedent must be in writing.³⁸ Therefore, because Harrison did not notify the Thomases of his waiver of the condition by the time for performance, July 30, 1998,³⁹ the condition was not waived and the contract "became legally defunct"⁴⁰ after July 30, 1998.

The supreme court found that the court of appeals' "rigid requirement that every waiver of a condition precedent must be expressly made"⁴¹ was not a correct statement of the law. Instead, conditions precedent may be waived by a party's conduct. In this case, Harrison owned a fifty percent interest in an entity that had actually acquired title to the nearby vacant lot.⁴² The supreme court found that the purchase of the lot by that entity was "substantial compliance with the condition"⁴³ and no waiver was necessary. Even if that were not the case, the court noted that Harrison's agent's communication with the Thomases that Harrison was ready to close the transaction would have sufficed for the

33. *Id.* at 818.

34. *Id.* at 819.

35. *Id.*

36. *Harrison I*, 744 N.E.2d at 983.

37. 692 N.E.2d 920 (Ind. Ct. App. 1998).

38. *Harrison I*, 744 N.E.2d at 983.

39. The court of appeals found, rather summarily, that because Harrison did not have tenant approval by July 30, 1998, the fifteen-day "extension" of the closing date did not apply. *Id.* at 982. The court did not cite any provision of the contract requiring the tenant approval be received by this or any other date.

40. *Id.* at 983.

41. *Harrison II*, 761 N.E.2d at 820.

42. *Id.* at 819.

43. *Id.* at 820.

communication of the waiver the court of appeals was seeking.⁴⁴ At any rate, the supreme court clarified that communication of the waiver of a condition precedent in a real estate purchase contract is not necessary, but such a waiver may occur in a number of ways, including the conduct of a party.

In an apparent case of first impression in *Kashman v. Haas*,⁴⁵ the court of appeals determined the extent of liability a seller of residential property may face in connection with the delivery to the buyer of a statutorily required disclosure form. In this case, the sellers owned and resided in property in Crawfordsville, Indiana, in which, as it turns out, some termites also resided. In 1990, the sellers discovered their fellow residents and called Terminex International to evict them. Terminex treated the house, but in 1994, the sellers discovered termite damage. Terminex had that repaired, but in 1997, the sellers again discovered termite damage in the home. Terminex re-treated the home and again repaired the damage.⁴⁶ The contractor doing the work "orally assured Sellers that all known termite damage had been repaired."⁴⁷

In 1998, the sellers sold the home to the buyers. Sellers dutifully complied with Indiana law by delivering to the buyers a disclosure form, which did not disclose any termite damage. The buyers had the property inspected and the inspector found no evidence of termite damage.⁴⁸ At the closing, the sellers gave the buyers a copy of the contract the sellers had with Terminex and told the buyers that the sellers had obtained it as a precaution because some homes in the neighborhood had suffered some termite infestation.⁴⁹ After closing, the buyers then discovered some termite damage in several areas throughout the home. The buyers sued for breach of contract and fraud based upon the "representations" made by the sellers in the disclosure form. The trial court granted the sellers' motion for summary judgment.⁵⁰

The court of appeals affirmed, holding that the buyers had no right to rely on the sellers' statements in the disclosure form. First, the statute mandating the disclosure form specifically states that "[a] disclosure form is not a warranty by the owner or the owner's agent, if any, and the disclosure form may not be used as a substitute for any inspections or warranties that the prospective buyer or owner may later obtain."⁵¹ The form promulgated by the Indiana Real Estate Commission also recites this provision of the statute.⁵² The court also found it important that the buyers had an opportunity to inspect the home for termite damage prior to closing. True to the long-standing rule of *caveat emptor* in Indiana law regarding sales of real property, the court noted that "[a] purchaser of property has no right to rely upon the representations of the vendor of the

44. *Id.*

45. 766 N.E.2d 417 (Ind. Ct. App. 2002).

46. *Id.* at 418-19.

47. *Id.* at 422.

48. *Id.* at 419.

49. *Id.*

50. *Id.*

51. IND. CODE § 32-21-5-9 (2002).

52. IND. ADMIN. CODE tit. 876, r. 1-4-2 (2002).

property as to its quality, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities.”⁵³

Second, the statute also contains a provision specifically excusing a seller from errors in a disclosure form if “the error, inaccuracy, or omission was not within the actual knowledge of the owner or was based on information provided . . . by another person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed to be correct.”⁵⁴ There was no evidence that the sellers actually knew of any termite damage that had not been repaired. Also, the sellers were informed in 1997 by the contractor doing the work that all known termite damage had been repaired. Therefore, the sellers could rely on the statute and had no liability for the misstatement in the disclosure form.

The last case to be discussed regarding interpretation of contracts between buyers and sellers is the court of appeals decision in *Warner v. Allen*.⁵⁵ This case serves as a potent reminder to contract drafters to pay attention to the survivability of certain provisions of real estate contracts. In this case, the seller owned property in Delaware County, Indiana. On May 18, 2000, a hailstorm caused some damage to the slate roof of the home. In June, the buyer and the seller entered into a contract for the purchase and sale of the home. The agreement contained a provision requiring the seller to maintain the property in its “present” condition. In addition, a typical provision was included that placed the risk of loss on the seller until closing. That provision went on to state that if there were any damage or destruction to the property prior to the closing, then the buyer could either terminate the agreement or close on the purchase and the seller’s right to insurance proceeds “shall be assigned in writing by Seller to Buyer.”⁵⁶ Apparently, no written assignment of insurance proceeds was executed at the closing.

It is unclear whether the buyer conducted any inspection of the property, but some time after closing the buyer noticed the damage to the roof. The buyer made a claim against his policy of insurance. The insurer denied the buyer’s claim because his policy was not in effect at the time of the damage. As fate would have it, the seller also used the same insurance company who determined that the claim was proper under the seller’s policy and issued a check jointly to the buyer and the seller for the damages. That check was never negotiated because the parties could not agree upon the proper distribution of the money.⁵⁷

53. *Kashman*, 766 N.E.2d at 422 (citing *Pennycuff v. Fetter*, 409 N.E.2d 1179, 1180 (Ind. Ct. App. 1980)). It is interesting to note that the court did not focus on the fact that the sellers informed the buyers at closing that they had a termite protection plan under the pretext that others in the area had termite problems. The sellers even advised the buyers to renew the contract. Those statements, if given prior to the delivery of the deed at closing, would seem to merit further discovery into the fraud claims asserted by the buyer and make summary judgment ill-advised.

54. IND. CODE § 32-21-5-11 (2002).

55. 776 N.E.2d 422 (Ind. Ct. App. 2002).

56. *Id.* at 424.

57. *Id.* at 425.

The trial court ultimately found in favor of the seller and the buyer appealed.⁵⁸

The court affirmed in rather summary fashion. The court stated that even if the casualty provision of the contract controlled this situation, the contract itself became ineffective as of the closing and delivery to the buyer of the deed.⁵⁹ The merger by deed doctrine is a long-standing doctrine and may be stated as follows: "In the absence of fraud or mistake, all prior or contemporaneous negotiations or executory agreements, written or oral, leading up to the execution of a deed are merged therein by the grantee's acceptance of the conveyance in performance thereof."⁶⁰ In other words, in this situation, the buyer could have prevailed only if the deed or another document executed at closing would have assigned the insurance proceeds to the buyer.

The court also addressed whether, in subsequent conduct of the seller, a promise was made that the seller would repair the roof. Several admissions made by the seller in discovery seemed to imply that the seller had agreed to repair the roof. However, the court dispatched those arguments by stating that no consideration was given by the buyer for that promise by the seller.⁶¹ Without consideration, the seller's promise was completely unenforceable.

B. Landlords and Tenants

We turn our attention now to cases dealing with the relationships between landlord and tenant. Perhaps the most significant case⁶² in this area is the 3-2 decision in the Indiana Supreme Court case of *Turley v. Hyten*.⁶³ This decision overturned a somewhat controversial court of appeals decision, which applied a standard of strict adherence to the notice provisions of the Indiana security deposits statute.⁶⁴ Regular readers of this publication may recall that last year's article roundly criticized the court of appeals decision.⁶⁵

This case involved a tenant who vacated the landlord's property in Darlington, Indiana, and left it in extremely poor condition. The tenant vacated the property in February, leaving a window open near the house's thermostat. That thermostat was set on high and all of the furnace's propane had been used up. These factors, in addition to extremely cold weather, caused significant damage to the house's plumbing system due to bursting of pipes and toilets.⁶⁶ A few weeks after the tenant vacated the house, the tenant wrote the landlord asking

58. *Id.* at 424-25.

59. *Id.* at 427.

60. *Id.* (quoting *Thompson v. Reising*, 51 N.E.2d 488, 491 (Ind. Ct. App. 1943)).

61. *Id.* at 428.

62. The most significant development is the adoption by the legislature of the Landlord/Tenant Act of 2002, discussed *infra* notes 194-207 and accompanying text.

63. *Turley v. Hyten*, 772 N.E.2d 993 (Ind. 2002).

64. IND. CODE §§ 32-31-3-1 to -19 (2002).

65. Lloyd T. Wilson, Jr., *Fulfilling the Deterrent and Restitutionary Goals of the Security Deposits Statute and Other Developments in Indiana Property Law*, 35 IND. L. REV. 1501, 1503-18 (2002).

66. *Turley*, 772 N.E.2d at 994-96.

for the return of his security deposit. The landlord promptly wrote back stating with some specificity the various types of damages that the tenant had caused to the house. The landlord's letter also stated that he had not gotten complete estimates for all of the repairs, but that the initial estimates were over \$1400.⁶⁷

The court of appeals found that although the landlord's letter was timely given in accordance with the security deposits statute,⁶⁸ the letter was deficient in that it did not specifically give an estimate for each damaged item.⁶⁹ Because of this deficiency, the tenant "was unable to discern whether the individual charges that comprised the \$1,400 were proper or reasonable."⁷⁰

The Indiana Supreme Court disagreed, holding that under these facts the landlord had complied with the statute in that the landlord's letter gave the tenant "more than enough information with which to contest the costs to which his security deposit was being applied."⁷¹ The landlord had complied with the statute to the best of his ability and in good faith. The damages the landlord had noted were far in excess of the \$450 security deposit the tenant had made.

Justice Rucker, in a dissent in which Justice Dickson concurred, argued that the court of appeals used long-standing rules of statutory construction to apply the security deposit statute to this case. In Justice Rucker's view, the language of the statute clearly obligates a landlord to give notice in a certain form if the landlord wants to apply any portion of the security deposit to repair damage to the property.⁷² Because the landlord here did not provide the itemized list required, the landlord should not be entitled to retain any portion of the security deposit. Justice Rucker "would insist that the landlord do what our legislature said it must do."⁷³

This may be a case where bad facts make bad law. Requiring the refund of a security deposit in light of extensive damage caused by the tenant himself seems patently unfair. However, the landlord could have avoided this situation by simply providing an itemized list as the statute requires. As Justice Rucker pointed out, "[t]he notice provision does not impose a difficult burden on the landlord."⁷⁴ Perhaps this case points out that the burden turns out to be more severe than previously thought. If so, it would seem that the legislature should remedy the requirement, not the courts.

67. *Id.* at 996.

68. The statute gives a landlord forty-five days after termination of occupancy to provide the notice of any damage and to return any portion of the security deposit to which the tenant is entitled. IND. CODE § 32-31-3-14 (2002).

69. *Turley v. Hyten*, 751 N.E.2d 749, 752 (Ind. Ct. App. 2001), *superceded by* 772 N.E.2d 993 (Ind. 2002).

70. *Id.*

71. *Turley*, 772 N.E.2d at 997.

72. *Id.* at 997-98 (Rucker, J., dissenting).

73. *Id.* at 998.

74. *Id.* (quoting *Pinnacle Props. v. Saulka*, 693 N.E.2d 101, 104 (Ind. Ct. App. 1998)).

C. Lienholders

Indiana law has for some time provided for married couples to own real property as “tenants by the entirety.”⁷⁵ Essentially, when spouses own property in this manner, neither can be thought of as having a divisible interest in the property. Instead, “property held in a tenancy by the entirety is held by a single legal entity created by the fiction of the unity of husband and wife.”⁷⁶

Those who own real estate as tenants by the entirety may not unilaterally transfer their interest in the property without the consent of their spouse. Neither spouse may unilaterally destroy the tenancy by the entirety, and neither spouse may oust the other from possession. With few exceptions, a tenancy by the entirety can be destroyed only by divorce⁷⁷ or by death.⁷⁸ Indiana law regarding tenancy by the entirety is similar to the laws in many other states, including Michigan. A case decided by the United States Supreme Court,⁷⁹ arising out of a dispute over real estate located in Michigan, may have dramatic implications for the meaning of many states’ laws regarding property held as tenants by the entirety.⁸⁰

In this case, the husband failed to pay federal income taxes for five years, and the IRS filed a federal tax lien against his property pursuant to a federal statute.⁸¹ After the lien was filed, husband and wife executed a quitclaim deed which purported to transfer husband’s interest in certain Michigan real estate owned by the couple as tenants by the entirety to the wife. The IRS agreed to release the lien and allow the wife to sell the property with half of the net proceeds to be held in escrow pending resolution of the question of whether the tax lien could attach to the husband’s interest in the property. The district court held that the federal tax lien could attach to the husband’s interest in the real estate and awarded half of the net proceeds of the sale to the IRS.⁸² On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that under Michigan state law, the husband had no separate interest in the property held as a tenant by the entirety and therefore the tax lien could not have attached to any interest he held in the property.⁸³

75. IND. CODE §§ 32-17-3-1 to -3 (2002).

76. *Dep’t of State Revenue v. Union Bank & Trust Co.*, 380 N.E.2d 1279, 1280 (Ind. App. 1978).

77. IND. CODE § 32-17-3-2.

78. *Id.* § 32-17-3-1.

79. *United States v. Craft*, 535 U.S. 274 (2002).

80. *But see* Steve R. Johnson, *Why Craft Isn’t Scary*, 37 REAL PROP. PROB. & TRUST J. 439 (2002). In this article, Johnson argues that the holding in the *Craft* case is and should be limited to federal tax liens, as the federal tax lien scheme involves a definition of “property” that does not rely on or comport with the states’ laws regarding whether a tenancy by the entirety interest is an interest in property that cannot be reached by creditors.

81. 26 U.S.C. § 6321 (2000).

82. *United States v. Craft*, 65 F. Supp.2d 651, 652 (W.D. Mich. 1999), *rev’d*, 535 U.S. 274 (2002).

83. *Craft v. United States*, 140 F.3d 638, 643 (6th Cir. 1998).

The United States Supreme Court granted certiorari to consider the IRS's claim that the husband had a separate interest in the entirety property to which the federal tax lien attached.⁸⁴ The court noted that the federal tax lien statute was drafted broadly so that it might reach "every interest in property that a taxpayer might have."⁸⁵ The question for the court, then, was to determine whether Congress intended the word "property" as used in the statute to include an individual's interest in property held as tenants by the entirety. The court began its analysis by noting as follows:

A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property. . . . State law determines only which sticks are in a person's bundle. Whether those sticks qualify as "property" for purposes of the federal tax lien statute is a question of federal law.

In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them.⁸⁶

The court noted that the husband had the right to use and possess the real estate; to sell the real estate with the consent of his spouse and that he would be entitled to one-half of the proceeds from such a sale; to inherit the real estate if his spouse predeceased him; and to mortgage the real estate with the consent of his spouse.⁸⁷ The only right that the husband did not have was the right to unilaterally alienate the real estate. The court held that this right was not "essential" to the definition of "property" in the federal tax lien statute.⁸⁸ The court appeared to be at least partially persuaded by practical concerns:

[The wife] had no more interest in the property than her husband; if neither of them had a property interest in the entirety property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entirety property, facilitating abuse of the federal tax system.⁸⁹

The obvious implication of *United States v. Craft* is that federal tax liens may attach to an individual spouse's interest in real estate held as tenants by the entirety, but they have the potential to remove many of the benefits of owning property as tenants by the entirety. The court has opened the door for state and federal courts to interpret liens and other encumbrances on "property" to attach to an individual spouse's interest in entirety property. Congress will also take note of this decision as it drafts new laws or evaluates old ones.

84. *United States v. Craft*, 535 U.S. 274 (2002).

85. *Id.* at 283 (quoting *United States v. Nat'l Bank of Comm.*, 472 U.S. 713, 713-20 (1985)).

86. *Id.* at 278-79.

87. *Id.* at 282.

88. *Id.* at 283.

89. *Id.* at 285.

II. CREATION AND ENFORCEMENT OF PROPERTY INTERESTS

Easements and restrictive covenants are largely the creatures of the common law, although there are some statutes which deal with some aspects of each property interest. Four cases during the survey period presented the courts with the opportunity to address significant or interesting issues regarding the creation and enforcement of easements and restrictive covenants.

A. Limiting Injunctive Relief for Violations of Restrictive Covenants

Dean owned a home in a residential subdivision in Indianapolis that was developed by Crossmann Communities (“Crossmann”).⁹⁰ The plat of the subdivision contained certain restrictive covenants, including a minimum side yard setback of five feet so as to maintain a distance of at least ten feet between homes. Dean built her home six feet inside the property line in order to establish more space between structures.⁹¹ After Dean’s house was finished, Crossmann began construction on the adjoining lot 196. A staked survey of lot 196 indicated that the improvements under construction were only 4.6 feet inside the property line, rather than the five feet required by the restrictive covenant. After Crossmann laid the foundation, Dean filed a request for a temporary restraining order to prevent Crossmann from continuing work on lot 196. The trial court granted the order, and Dean filed a complaint requesting a permanent injunction and damages. The trial court granted a preliminary injunction, and Crossmann appealed.⁹²

The question before the Indiana Court of Appeals in *Crossmann* was whether the trial court abused its discretion by granting Dean a preliminary injunction. Among the factors to be considered by the trial court in deciding whether or not injunctive relief is appropriate is whether the plaintiff’s remedies at law are adequate.⁹³ Dean argued that, in this case, monetary damages would be inadequate because the diminished setback would present drainage and fire hazard issues. On this point, the court began by stating that: “A restrictive covenant constitutes a compensable interest in land.” As such, the violation of restrictive covenants is necessarily subject to an economic assessment.⁹⁴ The

90. *Crossmann Cmty., Inc. v. Dean*, 767 N.E.2d 1035 (Ind. Ct. App. 2002).

91. *Id.* at 1037-38.

92. *Id.* at 1037-40.

93. *Id.* at 1040.

94. *Id.* at 1042 (citation omitted). The citation for the proposition that “a restrictive covenant constitutes a compensable interest in land” is *Dible v. City of Lafayette*, 713 N.E.2d 269, 273 (Ind. 1999). In *Dible*, landowners sued the city in order to halt construction of a storm sewer drain and sewage lift station that the plaintiffs contended was being constructed in violation of a restrictive covenant. The Indiana Supreme Court concluded that although a restrictive covenant is not enforceable against a city, which has the power of eminent domain, the violation of a covenant is a taking that entitles the landowners to compensation. *Id.* at 273. See also *Daniels v. Area Plan Comm’n*, 306 F.3d 445 (7th Cir. 2002), discussed *infra* Part III.A. The statement in *Dible* that a restrictive covenant is a “compensable interest in land” is thus tied to the landowners’ ability to seek relief through the law of eminent domain, not an injunction. 713 N.E.2d at 273. A fee simple is

court then dismissed Dean's arguments that the violation of the restrictive covenant would cause irreparable harm because her safety concerns were "subjective" and "directed to the possibility of a future injury."⁹⁵ This reasoning implies that the violation of the restrictive covenant did not constitute, by itself, irreparable harm. Instead, it suggests that to avail herself of injunctive relief, a plaintiff must show evidence of some other injury that rises to the level of irreparable harm and flows from the defendant's violation of the restrictive covenant. This appears to be a new principle of law that is inconsistent with a number of prior holdings by the Indiana appellate courts.⁹⁶ It also suggests a high bar for plaintiffs seeking injunctive relief as a remedy for the violation of a restrictive covenant.

The court cites no precedent for the proposition, implicit in its analysis, that it may conduct an inquiry into the merits and value of the restrictive covenant that has been violated in order to determine whether monetary damages are an adequate remedy. However, it appears likely that future defendants will attempt to use *Crossmann* to urge trial courts to conduct just such an inquiry. The potential significance of the *Crossmann* decision is most obvious with respect to the common restrictive covenants in residential subdivisions which restrict the aesthetics of the community. Under the reasoning used in *Crossmann*, it may be difficult for homeowners' associations suing to enforce such restrictive covenants to obtain injunctive relief because it will be difficult to prove an injury which both: (1) is a result of the violation of the restrictive covenant; and (2) constitutes irreparable harm. It may be harder still to arrive at an amount of monetary damages which would adequately compensate a neighborhood for, say, a renegade homeowner's decision to paint his home lime green in violation of a restrictive covenant.⁹⁷ The long-term significance of *Crossmann* may be that it

also a compensable interest in the context of eminent domain, but it does not follow that a plaintiff suing for specific performance of a contract for the purchase of real estate would therefore not be entitled to injunctive relief. In fact, the opposite is true. *See Ruder v. Ohio Valley Wholesale, Inc.*, 736 N.E.2d 776, 779 (Ind. Ct. App. 2000) ("Specific performance is a matter of course when it involves contracts to purchase real estate.")

95. *Id.* at 1042.

96. *See, e.g.,* *Crawley v. Oak Bend Est. Homeowners Ass'n, Inc.*, 753 N.E.2d 740 (Ind. Ct. App. 2001) (concerning the violation of a restrictive covenant that forbids parking recreational vehicles in homeowner's driveways); *Highland v. Williams*, 336 N.E.2d 846 (Ind. Ct. App. 1975) (affirming order to remove home built in violation of restrictive covenant); *Vogel v. Harlan*, 277 N.E.2d 173 (Ind. Ct. App. 1971) (affirming injunction ordering removal of home that was being constructed in violation of restrictive covenants); *Schwartz v. Holycross*, 149 N.E. 699, 702 (Ind. App. 1925) ("It is well settled that a court of equity has the power . . . to enjoin the violation of restrictive building covenants . . . and that a mandatory writ may be issued to compel the modification, or even the removal, of a building erected in violation of such covenants.").

97. As the Indiana appellate courts have noted in the line of cases concerning injunctive relief for violation of a covenant not to compete, injunctive relief is appropriate in those situations where damages are difficult to quantify. *See, e.g., Roberts' Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 864 (Ind. Ct. App. 2002) (quoting *Washel v. Bryant*, 770 N.E.2d 902, 907 (Ind. Ct. App. 2002) ("A legal remedy is adequate only where it is as plain and complete and adequate - or, in

frustrates the enforcement of some restrictive covenants and gives homeowners who do not wish to comply the opportunity to opt-out if they are willing to pay for the privilege. Either possibility undermines the rationale behind the restrictive covenants: to preserve neighborhood character and property values. Unfortunately, the Indiana Supreme Court will not have an immediate opportunity to review *Crossmann*, as the deadline for Dean to file a petition for rehearing or transfer has lapsed without her action.

B. Restrictive Covenants Limiting Satellite Dishes and Antennae

Crooked Creek, a residential subdivision in Marion County, is subject to plat covenants and restrictive covenants that were recorded in 1994.⁹⁸ In 1995, the Hollidays purchased a lot in Crooked Creek. When they built their home, the Hollidays installed three satellite dishes and six masts behind their home, secured by guy wires.⁹⁹ Five of the masts were approximately thirty feet tall, roughly even with the roofline of their home. Five television antennae and three satellite dish antennae were attached to the masts. All of these communication devices supplied various signals to seventeen televisions, nine videocassette recorders, and seven satellite receivers in the Hollidays' home.¹⁰⁰

In 1998, the Crooked Creek Villages Homeowners' Association (the "Association") notified the Hollidays that the antennae and satellite dishes were in violation of the restrictive covenant which required homeowners to obtain approval from Crooked Creek's architectural committee before erecting any "structure."¹⁰¹ The Hollidays responded that the covenant was in violation of Federal Communications Commission ("FCC") rules and thus unenforceable as written. Crooked Creek filed a lawsuit, asking for an injunction to require the Hollidays to remove their satellite dishes, masts, and antennae. The Hollidays asked for, and were granted, a continuance in order to obtain a declaratory ruling from the FCC regarding the enforceability of the covenant under 47 C.F.R. section 1.400.¹⁰²

The FCC responded that the covenant is "prohibited and unenforceable" to the extent that it impairs the installation, maintenance, or use of over-the-air reception antennae protected by the federal rule.¹⁰³ The FCC noted that Crooked

other words, as practical and efficient to the ends of justice and its prompt administration - as the remedy in equity.")); *Norlund v. Faust*, 675 N.E.2d 1142, 1149-50 (Ind. Ct. App.), *clarified on denial of reh'g*, 678 N.E.2d 421 (Ind. Ct. App. 1997), *trans. denied* ("It would be pure speculation to place a dollar amount on the damages, and an injunction against the prohibited behavior is the most efficient way to lift the burden of that harm from the shoulders of the employer who contracted so as not to suffer such harm.").

98. *Holliday v. Crooked Creek Villages Homeowners Ass'n*, 759 N.E.2d 1088 (Ind. Ct. App. 2001).

99. *Id.* at 1090.

100. *Id.* at 1090-91.

101. *Id.* at 1091.

102. *Id.* (citing 47 C.F.R. § 1.400 (2002)).

103. *Id.* at 1093.

Creek has a stated policy of limiting homeowners to one satellite dish antennae and one television antennae, a limit apparently based on aesthetic concerns rather than safety. The FCC found that, in the absence of a valid safety justification, such an arbitrary limit can violate the federal rule if the viewer needs more than the number of antennae allowed to receive an acceptable quality signal. The FCC also found that "[a] restricting entity may prohibit the installation of equipment that is merely duplicative and not necessary for the reception of video programming."¹⁰⁴ After considering the FCC's ruling, the trial court found that the Hollidays' antennae and dishes were duplicative and issued an order requiring the Hollidays to take down all but one mast attached to their house capable of supporting one satellite dish and one antennae.¹⁰⁵ The Hollidays appealed, arguing that the undisputed evidence demonstrated that the Hollidays designed their system to provide an acceptable quality signal to *all* of the television sets in the home and that it was therefore not duplicative.

The court of appeals noted that the FCC ruling indicates that federal law guarantees a homeowner the right to an acceptable quality signal to receive all television programming which they wish to receive, not necessarily on every device where such programming is desired. It also noted that Mr. Holliday admitted that he receives all of the television programming that he wishes to receive (DirecTV, cable and local stations) on the television set in the master bedroom. In light of this evidence, the court of appeals concluded that because the Hollidays' satellite dish and antenna system was "merely duplicative," it was subject to the prohibition of the restrictive covenant. The injunctive relief granted by the trial court was affirmed.¹⁰⁶

The Hollidays challenged the trial court's ruling on the basis that the evidence was insufficient to support the judgment, not that injunctive relief was inappropriate.¹⁰⁷ If that issue had been raised after the court's decision in *Crossmann*, assuming that *Crossman*'s reasoning would have been followed, it is possible that the court would have remanded for the calculation of monetary damages on the basis that Hollidays' violation of the restrictive covenant did not cause irreparable harm to Crooked Creek because, as the FCC pointed out, the restrictive covenant was motivated by aesthetic rather than safety concerns.¹⁰⁸

C. Fiber Optics Cables in Railway Right-of-Way Easements

The plaintiffs in *Hynek v. MCI World Comm., Inc.*,¹⁰⁹ were land owners in northern Indiana whose property borders a railroad corridor. Plaintiffs challenged the right of several railroad companies, which owned interests ranging from a fee simple to a right-of-way easement in the railroad corridor, from granting an easement to telecommunications companies for the purpose of

104. *Id.*

105. *Id.* at 1091.

106. *Id.* at 1094-95.

107. *Id.* at 1090.

108. *Holliday* was decided before *Crossmann*.

109. 202 F. Supp. 2d 831 (N.D. Ind. 2002).

installing fiber optic cable lines in the corridor.¹¹⁰ Defendants filed a motion to dismiss for failure to state a claim.

For purposes of its decision on the motion to dismiss, the district court assumed that the railroad companies simply held a railroad right-of-way easement rather than a larger estate in the corridor. It then considered whether, under Indiana law, the owners of such easements have the “legal right to license the use of their railroad corridor for the purpose of installing fiber optic communications without being required to seek permission from or compensate the holders of the fee simple interest in the railroad corridor.”¹¹¹

The district court gleaned a three-part analytical framework from a handful of federal opinions which dealt with the same issue. It considered: (1) the extent to which the fiber optic cable burdened the railroad easement; (2) the extent to which the fiber optic cable related to or benefited the railroad easement; and (3) whether the railroad company had a legal right to place the fiber optic cable in the railroad easement pursuant to statutory law.¹¹²

Although the district court noted that the Indiana appellate courts have not yet expressly determined the scope of a railroad right-of-way easement or the right of railroad companies to use or license such an easement for other purposes, the court read a handful of cases together to find that under Indiana law, “a railroad easement may be used for certain additional uses by the railroad that are both consistent with its current uses and/or those uses that do not involve an additional burden to the servient estate.”¹¹³

Hynek is interesting because, although it was guided by divergent opinions from other jurisdictions, the district court was essentially forced to create an analytical framework to address the issue out of whole cloth. Applying the three criteria outlined above to this case, the court found that the buried fiber optic cable would not place an additional burden on the adjoining landowners which held the fee simple interest in the corridor, would be incidental to the railroad’s own use, and is consistent with Indiana law.¹¹⁴ Based upon the court’s interpretation of what it characterized as “Historical and Public Policy

110. *Id.* at 831-32.

111. *Id.* at 832.

112. *Id.* at 834-35.

113. *Id.* at 836-37 (citing *Consumers’ Gas Trust Co. v. Am. Plate Glass Co.*, 68 N.E. 1020 (Ind. 1903); *Ritz v. Ind. & Ohio R.R., Inc.*, 632 N.E.2d 769 (Ind. Ct. App. 1994); *Calumet Nat’l Bank v. AT&T*, 682 N.E.2d 785 (Ind. 1997)).

114. *Id.* at 839. The conclusion that this scheme was consistent with Indiana law was based upon the court’s interpretation of IND. CODE §§ 32-5-12-1 to -15 (1998) (*repealed by* Pub. L. 2-2002, § 128) (current version at IND. CODE §§ 32-23-11-1 to 32-23-11-15 (Supp. 2002)), the Abandoned Right-of-Way Act, which protected utility lines in the railroad corridor after the underlying easement was abandoned. Although the cited code sections did not expressly state that utility companies, specifically telecommunications companies, had the right to locate in the right-of-way, to conclude that this law was not consistent with permitting such use “would require the court to draw the inference that such prior conveyances, legal occupancy or license to such third-party utility companies by the railroad would have been a mistake or fraud.” *Id.* at 837.

Considerations,”¹¹⁵ it appears that, in the court’s view, a railroad company would be limited to using or licensing others to use the corridor for communications lines that place no additional burden on the fee owners and are otherwise incidental to the railroad’s own use.¹¹⁶

D. Creating Easements on Platted Land

Nichols, a developer, sought to plat a residential subdivision consisting of 183 lots and one common park area.¹¹⁷ The Columbus Plan Commission approved the request subject to Nichols adding “mid-block pedestrian easements where required by ordinance for access to the park.”¹¹⁸ After reviewing a plat of the subdivision, the Joneses purchased lot 164.¹¹⁹ At the time of their purchase, the plat showed a ten-foot-wide pedestrian and utility easement between lot 164 and the adjoining lot 163, and a twenty-foot-wide utility easement along the backside of lot 164 and the adjoining backside of lot 153.¹²⁰ A few months after their purchase, Nichols installed sidewalks on all of the subdivision’s pedestrian easements. He also installed a sidewalk on the utility easement between lots 164 and 153.¹²¹ In 1998, Nichols recorded a fifteen-foot-wide pedestrian easement along the rear of lot 153, where he had already installed the sidewalk.¹²² The Joneses and some of their neighbors filed complaints against Nichols, alleging that the 1998 pedestrian easement was contrary to the platted utility easement and that the pedestrian easement was not being used for a *residential purpose*, in violation of the subdivision’s restrictive covenants.¹²³ The trial court granted summary judgment to Nichols on all claims and the plaintiffs appealed.¹²⁴

The first question before the court in *Nichols* was whether a developer may grant easements over lots that it still owns after the first lot in a platted subdivision has been sold to a third party. The plaintiffs argued, without citing direct authority, that a subdivision’s plat gives notice of its contents both by “that which *is* affirmatively delineated and designated upon the plat (easements, roads, etc.) and that which *is not* seen upon the plat, i.e., an *absence* of a pedestrian easement.”¹²⁵ In other words, the Joneses argued that a plat contains an implied covenant that restricts a developer from creating any further encumbrances in lots it retains. The Joneses relied on *Wischmeyer v. Finch*¹²⁶ for the proposition that

115. *Hynek*, 202 F. Supp. 2d at 837-38.

116. *Id.* at 838.

117. *Jones v. Nichols*, 765 N.E.2d 153 (Ind. Ct. App. 2002).

118. *Id.* at 154.

119. *Id.* at 155.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 155-56.

124. *Id.* at 156.

125. *Id.* at 156 (emphasis added by the court) (quoting Brief for Appellants at 17).

126. 107 N.E.2d 661 (Ind. 1952) (holding that an Indiana statute which addresses to the vacation of a restrictive covenant also applies to a modification of a restrictive covenant.)

in order to create an easement after selling a lot, a developer should be required to vacate and re-plat the subdivision with the easement.¹²⁷

The Indiana Court of Appeals was unpersuaded by the Joneses' arguments, finding that *Wischmeyer's* requirement that a developer vacate and re-plat a subdivision in order to modify, add, or delete restrictive covenants is a strict rule that should not be extended to a developer who wishes to grant easements in lots it retains.¹²⁸ The court distinguished between a restrictive covenant, which is "a creature of equity arising out of contract,"¹²⁹ and an easement, which "is essentially an inherently legal interest in land."¹³⁰ By highlighting this distinction, the court of appeals summarily dismissed the relevance of *Wischmeyer* and held that a plat does not contain an implied covenant that a developer will not establish any further easements on lots that it owns.¹³¹

The court then turned to the plaintiffs' second argument, that the sidewalk in the pedestrian easement on lot 153 was a violation of the subdivision's restrictive covenant that "[n]o lot shall be used for anything except residential purposes."¹³² Nichols, the developer, was the owner of lot 153 at the time that he granted the pedestrian easement across the lot. The plaintiffs argued that the Nichols had no intent to reside on lot 153 and granted the pedestrian easement for the benefit of the subdivision, in other words, for a commercial purpose.¹³³ Without citing authority, the court held that "Nichols' status as a developer and motivation for granting the pedestrian easement are irrelevant. Instead, we focus on the purpose for which the pedestrian easement is used."¹³⁴ Because the granting language of the pedestrian easement limited its use to the residents of the subdivision and "foot traffic only," the court concluded that it did not violate the restrictive covenant.¹³⁵

III. LAND USE LAW

Two significant cases in the survey period examined the constitutionality of state action in the context of land use law. The first ruled on the constitutionality of an Indiana statute permitting local planning commissions to vacate a plat and accompanying restrictive covenants. The second dealt with a local ordinance restricting the number of non-related adults who may co-habitate in an area zoned for single family dwellings.

127. *Jones*, 765 N.E.2d at 157-58. In order to re-plat, a developer would be required to comply with an expensive and time-consuming process. The steps include obtaining the subdivision's landowners' written consent to the vacation, the consent of the appropriate plan commission, and the consent of the interested landowners.

128. *Id.* at 158.

129. *Id.* (quoting *Shiner v. Baita*, 710 So. 2d 711, 712 (Fla. Dist. Ct. App. 1998)).

130. *Id.*

131. *Id.*

132. *Id.* at 158.

133. *Id.* at 159.

134. *Id.*

135. *Id.*

A. Vacation of Restrictive Covenants and Plats

In 1940, the Broadmoor addition in Fort Wayne was surveyed and platted for eighty lots.¹³⁶ The plat contained a restrictive covenant limiting lots to residential uses.¹³⁷ In 1999, HNS Enterprises, LLC and LST, LLC (collectively, "HNS"), as owners of Broadmoor lots numbered three through five, submitted a rezoning petition and application for primary development to the Area Plan Commission of Allen County (the "Plan Commission"). In the application, HNS asked the Plan Commission to vacate their lots and the accompanying restrictive covenants from the Broadmoor plat pursuant to Indiana Code section 36-7-3-11.¹³⁸ HNS also asked the Plan Commission to rezone the lots to a commercial rather than residential zoning designation and to approve a primary development plan to build a 12,000 square foot shopping center on the lots.¹³⁹ After a public hearing and at least one meeting, the Plan Commission approved the application. The Commission found that it was in the public interest to vacate the lots and covenants from the Broadmoor plat because it would allow the site to be redeveloped with commercial uses which would be more appropriate uses for the property than the "uninhabited and deteriorating residential structures" that were then situated on the lots.¹⁴⁰ In addition, the Plan Commission found that the value of the other lots in Broadmoor would not be diminished by the vacation.¹⁴¹ After the ruling by the Plan Commission, the Daniels, who also owned a lot in Broadmoor, filed a complaint seeking damages under 42 U.S.C. § 1983, and a declaratory judgment that the Plan Commission violated the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Indiana Constitution.¹⁴² The federal district court, on cross-motions for summary judgment, found that the Plan Commission violated the Daniels' Fifth Amendment rights by vacating the restrictive covenant without a public purpose.¹⁴³ The district court also found that Indiana's statutory provision for filing a petition to vacate¹⁴⁴ was unconstitutional because it does not require the Commission to follow the procedure for determining public use set forth in the State's eminent domain statute.¹⁴⁵ The Plan Commission appealed.

The Seventh Circuit was faced with two significant questions.¹⁴⁶ First, did

136. *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445 (7th Cir. 2002).

137. *Id.* at 449. The restrictive covenant read: "No building other than a single family dwelling and a private garage shall be built on any one lot." *Id.*

138. IND. CODE § 36-7-3-11 (1998).

139. *Daniels*, 306 F.3d at 449.

140. *Id.* at 449-50.

141. *Id.* at 450.

142. *Id.* at 451.

143. *Id.*

144. IND. CODE § 36-7-3-11 (1998).

145. *Daniels*, 306 F.3d at 451.

146. The Seventh Circuit also considered the Plan Commission's claim that the federal court did not have subject matter jurisdiction over the Daniels' claim because the Daniels failed to

the Plan Commission's vacation of the plat and restrictive covenant on lots three through five constitute a taking of the Daniels' property for a private purpose? Second, is Indiana Code section 36-7-3-11 facially unconstitutional under the Takings Clause of the United States Constitution?

The Seventh Circuit began by noting that under Indiana law, a restrictive covenant is a constitutionally protected property interest.¹⁴⁷ Because the Daniels no longer have the ability to prevent commercial development on lots three through five, the court concluded that they had demonstrated that a property right has been taken by state action.¹⁴⁸ The next question was whether the property interest, i.e., the restrictive covenant, was taken for a public use. The court noted that it is an established principle that implicit in the Fifth Amendment is a requirement that the government not take property for private purposes, even with just compensation.¹⁴⁹ Although the existence of public use is required to justify a taking, the burden on the State is "remarkably light."¹⁵⁰ The State must merely show that its exercise of eminent domain power is "rationally related to a conceivable public purpose."¹⁵¹ In this case, the General Assembly did not define what constitutes a "public use" under Indiana Code section 36-7-3-11(e)¹⁵² and instead delegated that duty to local plan commissions.¹⁵³ The Seventh Circuit was clearly troubled by a situation in which a "local plan commission is making legislatively unrestrained decisions as to what constitutes a public use."¹⁵⁴ The Seventh Circuit noted that upon judicial review, the Plan Commission's determination of a public use would be afforded almost complete deference unless it fell outside of the definitions of "public use" used in other areas of state law.¹⁵⁵

In this case, the Plan Commission determined that the vacation was in the public interest because it would allow lots three through five to be redeveloped with commercial uses which would be more appropriate for the property and a benefit for the immediate neighborhood. It further found that the uninhabited and deteriorating residential structures on those three lots at the time would be

exhaust their remedies in state court through the inverse condemnation statute. The Seventh Circuit noted that the Daniels suffered no monetary loss because of the violation of the restrictive covenant and that injunctive relief was not a potential remedy under the Indiana inverse condemnation statute. Because the state inverse condemnation procedure is thus inadequate, the Seventh Circuit held, to address the Daniels' injury, that Daniels satisfied the futility requirement under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and that the federal courts had subject matter jurisdiction. *Daniels*, 306 F.3d at 457-58.

147. *Daniels*, 307 F.3d at 459.

148. *Id.*

149. *Id.*

150. *Id.* at 460.

151. *Id.*

152. IND. CODE § 36-7-3-11(e) (1998).

153. *Daniels*, 306 F.3d at 460-61.

154. *Id.* at 461.

155. *Id.*

removed.¹⁵⁶ The Plan Commission made a number of findings of fact in support of this stated public use.¹⁵⁷ However, the Seventh Circuit noted that the vacation of the restrictive covenant itself would not provide any public benefit unless the lots were actually developed and the dilapidated houses thereon were actually removed. In the meantime, HNS, as owner of property with a more valuable potential use, was the recipient of an immediate, direct, and valuable benefit.¹⁵⁸

The Seventh Circuit next examined what public purposes the General Assembly had established in other contexts and noted that the General Assembly has determined that economic development on its own does not constitute a public purpose sufficient to satisfy the public use requirement inherent in the exercise of the power of eminent domain under Indiana law. Instead, economic development is a public purpose only if the area has been determined to be "blighted" in compliance with certain other statutes.¹⁵⁹

Next, the Seventh Circuit examined whether the Plan Commission's stated public purpose for the Broadmoor vacation satisfies the Fifth Amendment's public use requirement. The court noted precedent for the proposition that the public use must be "substantially related to the advancement of the public health, safety, or welfare."¹⁶⁰ After examining a number of relevant cases, the Seventh Circuit determined that in this case, the Plan Commission's stated purpose was not substantially related to the state's police powers because there was no requirement that the vacated lots be developed in a manner which benefited the public interest.¹⁶¹ Instead, it held that "[t]he public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if a landowner chooses to use his property in a beneficial, but not mandated, manner."¹⁶²

In sum, the Seventh Circuit concluded that the Plan Commission violated the public use requirement because it did not follow a legislative determination of the factors constituting a public use and did not demonstrate that the vacation of the restrictive covenant was substantially related to a public interest.¹⁶³

Although the Seventh Circuit upheld the district court's ruling with respect to the application of Indiana Code section 36-7-3-11 to the vacation of the Broadmoor lots, it reversed the district court with respect to the Daniels' facial challenge to the statute's constitutionality. The Daniels argued that the statute is facially invalid because it does not define what constitutes a public purpose, a deficiency that the Seventh Circuit recognized.¹⁶⁴ However, the Seventh Circuit noted that neither the Supreme Court nor the Seventh Circuit has ever required a specific legislative statement as to the limits of a public purpose.

156. *Id.* at 461-62.

157. *Id.* at 462.

158. *Id.*

159. *Id.* at 462-64.

160. *Id.* at 464.

161. *Id.* at 465-66.

162. *Id.* at 466.

163. *Id.* at 466-67.

164. *Id.* at 467.

Instead, “because the power of eminent domain is coterminous with the police power, as long as a taking is substantially related to the advancement of the health, safety and welfare of the public it is constitutionally sound under the Public Use Clause.”¹⁶⁵ The Seventh Circuit found that the limits contained in Indiana Code section 36-7-3-11(e)¹⁶⁶ “sufficiently direct a plan commission to act only in concert with the Fifth Amendment. . . . Therefore, since the covenant vacation statute has potential constitutional applications, this facial attack fails.”¹⁶⁷

Although it upheld Indiana Code section 36-7-3-11, the *Daniels* opinion provides lot owners who oppose the vacation of restrictive covenants by local plan commissions several powerful arguments in as applied challenges. Because the statute lacks a clear description of the factors which constitute proper public purposes, opponents will likely challenge future vacations of covenants on the grounds that they were not substantially related to a bona fide public purpose. An amendment to the statute which limits the discretion of plan commissions and defines permissible public purposes would likely satisfy some of the Seventh Circuit’s concerns and provide plan commissions with greater confidence that their determinations will withstand challenge. Additionally, the court’s emphasis on the fact that the Plan Commission did not tie the vacation to a particular use for the site may further complicate matters. The Seventh Circuit appeared to suggest that some uses for a non-blighted site may be permissible public purposes, but general use as a commercial site would not be permissible. It noted that a vacation would be constitutional, for example, “if the commission found that an area was under-served by doctors’ or dentists’ offices, or day care facilities, and the vacation would substantially serve to fill that need.”¹⁶⁸ If a plan commission made such a finding to justify a vacation, would it be required to create a kind of conditional vacation that permits only that specific public purpose? If the doctor’s office closed, would the vacation automatically terminate? These are uncertainties that clearly need to be addressed by the General Assembly. Until they are, it is likely that local plan commissions will have some hesitancy before they grant vacations similar to that overturned in *Daniels*, regardless of their findings of public purpose.

B. Constitutionality of Zoning Ordinance Defining “Family”

The City of Bloomington had a municipal zoning ordinance that limits the number of unrelated adults who may occupy a “dwelling unit” in areas of the City zoned for single family dwellings.¹⁶⁹ Dvorak was the owner of residential

165. *Id.*

166. IND. CODE § 36-7-3-11(e) (1998).

167. *Daniels*, 306 F.3d at 468-69.

168. *Id.* at 469.

169. “Family” means a family consisting of an individual or people related by blood, marriage, or legal adoption, and any other dependent children of the household. In the RE and RS districts and in the RT7 district except where overlaid by a PRO 15 district, “family” also includes a group of no more than three adults, and their dependent children, living together as a single housekeeping

property in an area of Bloomington so zoned.¹⁷⁰ In 1996, the City filed a complaint against Dvorak, claiming that he and his five tenants were in violation of the ordinance.¹⁷¹ Dvorak filed a motion for summary judgment, claiming that the ordinance was void as an *ultra vires* act, that it violated the article I, section 23 of the Indiana Constitution, and that it violated Dvorak's right to due process.¹⁷² The trial court denied the motion and the court of appeals accepted the case on an interlocutory appeal, vacated the decision of the trial court, and remanded for further proceedings, including a determination of the goals the ordinance was designed to promote.¹⁷³ In 2000, the trial court found the ordinance to be constitutional. Dvorak again appealed.¹⁷⁴

In *Dvorak II*, the court of appeals considered whether the Bloomington ordinance, which limits the number of unrelated adults who may live together in a single family residence, is constitutional under article I, section 23 of the Indiana Constitution, commonly known as the Privileges and Immunities Clause.

The court noted that a 1994 opinion by the Indiana Supreme Court, *Collins v. Day*, sets forth the framework for analyzing challenges to state action under article I, section 23.¹⁷⁵ Under *Collins*, a state actor may create a legislative classification so long as: (1) the different statutory treatment is reasonably related to the inherent characteristics that distinguish the unequally treated class; and (2) the preferential treatment is uniformly applicable and equally available to all persons similarly situated.¹⁷⁶

Under this framework, the court of appeals defined the "issue" in *Dvorak II* as "whether there are inherent distinctions between households consisting of unrelated adults versus those consisting of related adults that are reasonably connected to imposing the burden of exclusion from some neighborhoods."¹⁷⁷ The court examined a number of cases from other states dealing with similar ordinances and found those authorities to be split.¹⁷⁸ Turning back to the *Collins* test, the court noted that at the trial court level, the city presented evidence, via the testimony of the its planning director, that the goal of the ordinance was the

unit in a dwelling unit. In all other districts, "family" also includes a group of no more than five adults and their dependent children, living together as a single housekeeping unit in a dwelling unit. Bloomington Municipal Code § 20.02.01.00 (2000).

170. *Dvorak v. City of Bloomington*, 768 N.E.2d 490 (Ind. Ct. App.), *trans. granted, vacated* by 783 N.E.2d 695 (Ind. 2002) (*Dvorak II*). The authors of this Article represent the Indiana Association of Cities and Towns, which has been involved in *Dvorak* as an *amicus curiae* and has filed several briefs with the Indiana Court of Appeals and the Indiana Supreme Court supporting the position taken by the City of Bloomington in this matter.

171. *Dvorak v. City of Bloomington*, 702 N.E.2d 1121, 1122 (Ind. Ct. App. 1998) (*Dvorak I*).

172. *Id.*

173. *Id.* at 1125-26.

174. *See Dvorak II*, 768 NE.2d at 493.

175. *Id.* at 494-95 (citing *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)).

176. *Id.* at 495.

177. *Id.*

178. *Id.* at 495-97.

“protection of core neighborhoods through the reduction of adult population density and the reduction of external impacts such as traffic, trash generation, noise, and inappropriate parking of vehicles.”¹⁷⁹ The planning director had further testified that “the basis for his conclusion that regulating unrelated adults would promote these values was based on ‘professional literature’ and ‘planning premises’ that unrelated adults cause greater external impacts than related adults through more independent lifestyles.”¹⁸⁰ The court, unpersuaded by this testimony, held that the city failed to show that the legislative classification was “reasonable or substantial” because it was “based on mere planning premises without any documented support in professional literature.”¹⁸¹

The application of *Collins* to the Bloomington ordinance in *Dvorak II* appears to be inconsistent with prior caselaw and *Collins* itself. The problem began in *Dvorak I*, when the court of appeals remanded the case to the trial court so that the challengers would have an “opportunity for discovery in order to determine what goals the Ordinance was designed to promote.”¹⁸² In doing so, the *Dvorak I* court cited no precedent for its departure from the previously accepted understanding of *Collins*, which provides that all presumptions are in favor of the state actor and that the challenger must disprove “every conceivable basis” for the legislation, not simply those that were readily apparently or supplied to the trial court by counsel or evidence.¹⁸³

179. *Id.* at 497.

180. *Id.*

181. *Id.* At the end of the opinion, the court also summarily suggested that a constitutional right to privacy may be implicated by the ordinance because staying in compliance “may involve decisions relating to marriage, family, and child rearing.” The court continued that “[c]onstitutional protection of the right to privacy applies regardless of the choice an individual makes with regard to marriage and family. Therefore, the City may not burden those who exercise the choice not to create a ‘family’ as defined by the City.”

182. *Dvorak I*, 702 N.E.2d at 1125-26.

183. *Collins*, 644 N.E.2d at 80. The language in *Collins v. Day* was obviously crafted in light of the well-known and sometimes frustrating fact that the Indiana General Assembly has no legislative history. In deference to separation of powers, and recognizing that the judiciary should not substitute its judgment for that of the legislature, the Indiana Supreme Court did not require “evidence” of the goals that may have motivated a legislative body to create a classification. Instead, *Collins* directed trial courts to rely upon any reasonable set of circumstances which might validate a legislative classification. In *Collins*, the court recognized that the heavy burden assumed by challengers to a legislative action was consistent with longstanding precedent. *See, e.g.*, *Sperry & Hutchinson Co. v. Indiana*, 122 N.E. 584, 587 (Ind. 1919). Deference to the elected legislature is a long-standing principle in Indiana common law. The Indiana appellate courts have repeatedly endorsed the notion that absent the implication of a fundamental constitutional right, public policy should be determined at the ballot box, through the legislature, rather than through the courts. *See, e.g.*, *Sanchez v. State*, 749 N.E.2d 509, 516 (Ind. 2001).

[C]ourts must be careful to avoid substituting their judgment for those of the more politically responsive branches We [must also consider] the constitutional directive in Article I, Section 1 that “all power is inherent in the people.” This too suggests deference to legislation that does not run afoul of a specific constitutional provision.

On remand of *Dvorak I*, the trial court noted several possible bases for the ordinance, including the preservation of core neighborhoods and the desire to limit the negative impacts caused by a number of unrelated adults living together in a single dwelling unit. *Dvorak* asserted that these premises were insufficient to support the ordinance, but presented no evidence demonstrating that they were incorrect. By declaring the ordinance to be unconstitutional on this set of facts, *Dvorak II* essentially shifted the burden to the city to prove, through a certain quality of evidence, that: (1) the disparate treatment accorded by the ordinance is reasonably related to inherent characteristics which distinguish the unequally treated classes; and (2) that the preferential treatment is uniformly applicable and equally available to persons similarly situated. *Dvorak II* cites no precedent for this implicit burden shifting. Indeed, there appears to be none.¹⁸⁴

In September 2002, the Indiana Supreme Court granted transfer in *Dvorak II* and vacated the court of appeals opinion. At the time this Article was written, it had not yet handed down its own opinion.

IV. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

Only one case during the survey period had a significant impact on the common law of property. The court of appeals was asked to decide a case involving a claim of adverse possession in *Allen v. Moran*.¹⁸⁵ In this case, Mr. Moran purchased property in Morgan County, Indiana, and was told by his seller that a fence designated the eastern boundary of the property. The fence apparently was erected by the neighbor for the purpose of restraining the neighbor's cattle. In 1995, the Allens purchased the neighboring tract and the survey prepared in connection with that closing showed that the fence was to the west of the boundary line. Three years later, the Allens removed the fence and began clearing the property line as shown on the survey they had obtained in order to construct a new fence on that line.¹⁸⁶ This action displeased Moran, and he eventually brought suit to quiet title to the land to the west of the old fence line. The trial court agreed with Moran and entered judgment accordingly. The Allens appealed and the court of appeals reversed the judgment of the trial court.¹⁸⁷

The court found that Moran had not satisfied his burden of showing that his

Id.

184. See, e.g., *Lake County Clerk's Office v. Smith*, 766 N.E.2d 707, 713 (Ind. 2002) ("In determining whether a statute complies with or violates Article I, Section 23, courts must exercise substantial deference to legislative discretion.") (citing *Martin v. Richey*, 711 N.E.2d 1273, 1280 Ind. 1999)); *Linke v. Northwestern School Corp.*, 763 N.E.2d 972, 986 (Ind. 2002) (holding that "the Linkes have not carried their burden to 'negative every reasonable basis' for random drug testing imposed on the class of which they are member."); *IHSAA v. Carlberg*, 694 N.E.2d 222 (Ind. 1997) ("We find that Carlberg has not carried the burden to 'negative every reasonable basis' for his burden of limited eligibility imposed upon the class of which he is a member.").

185. 760 N.E.2d 198 (Ind. Ct. App. 2002).

186. *Id.* at 199.

187. *Id.* at 200-01.

alleged possession of the land up to the old fence line was sufficient to show that he had adversely possessed that property.¹⁸⁸ One factor the court noted was that there was no evidence that the parties ever agreed with one another that the old fence line was actually the boundary between the two properties. Moran argued that this case was similar to the 1995 case of *Clark v. Auckerman*¹⁸⁹ in which a fence was found to be the border between two parcels. In *Clark*, the court relied on prior case law to hold that if the parties have agreed upon a boundary between their respective properties and have made improvements in accordance with that understanding, each party is estopped from denying the agreed-upon boundary regardless of the time period of the possession.¹⁹⁰ However, the court pointed out that in *Clark* there was evidence that both parties believed the fence to be the boundary and the adverse claimant had made a number of substantial improvements to the fence and the area in dispute over the years.¹⁹¹

In this case, the court found that Moran did not meet the burden of making this showing. He presented no evidence that both parties believed the actual boundary of the properties was the old fence line, nor had he ever undertaken any improvements to the strip of land in question. In short, Moran did not exhibit “palpable and continuing acts of ownership over the fence or the land around the fence that was found, by the survey, to be the Allens’ land.”¹⁹² Because of this failure, the court held that Moran had not adversely possessed the land in question.

V. NEW STATUTES

Two statutes passed by the 2002 General Assembly made noteworthy changes to Indiana property law. The first relates to the respective responsibilities and obligations of residential tenants and landlords. The second recodified Title 32 of the Indiana Code.

A. *The Landlord/Tenant Act of 2002*

The Landlord/Tenant Act of 2002 became effective as of July 1, 2002.¹⁹³ This legislation was aimed at improving the stock of rental housing throughout

188. A party asserting adverse possession must prove that his “possession was (1) actual, (2) visible, (3) open and notorious, (4) exclusive, (5) under claim of ownership, (6) hostile, and (7) continuous for the statutory period.” *Penn. Cent. Transp. Co. v. Martin*, 353 N.E.2d 474, 476 (Ind. Ct. App. 1976) (citing *Longabaugh v. Johnson*, 321 N.E.2d 865, 868 (Ind. App. 1975)). In addition, the claimant must also have paid the taxes with respect to the property during the period of adverse possession. IND. CODE § 32-21-7-1 (Supp. 2002).

189. 654 N.E.2d 1183 (Ind. Ct. App. 1995).

190. *Id.* at 1186 (citing *Adams v. Betz*, 7 N.E. 649 (Ind. 1906)).

191. *Allen v. Moran*, 760 N.E.2d 198, 201 (Ind. Ct. App. 2002).

192. *Id.* at 202. In addition, the court of appeals cites to no evidence that Moran paid any taxes on the property in question. This should be, in and of itself, sufficient to deny Moran’s claim of adverse possession.

193. Pub. L. 92-2002, § 2 (codified at IND. CODE §§ 32-31-7-1 to -7 and §§ 32-31-8-1 to -6 (Supp. 2002)).

the state by requiring landlords to adhere to a certain level of maintenance of residential property they lease,¹⁹⁴ and requiring tenants to adhere to use standards.¹⁹⁵ The new act applies to dwelling units that are leased after June 30, 2002,¹⁹⁶ unless the lease contains an option to purchase.¹⁹⁷ Any attempt to waive compliance with the statute is void.¹⁹⁸

The principal portion of the statute requires a landlord to do the following with respect to the landlord's rental premises:

- (1) Deliver the rental premises to a tenant in compliance with the rental agreement, and in a safe, clean, and habitable condition.
- (2) Comply with all health and housing codes applicable to the rental premises.
- (3) Make all reasonable efforts to keep common areas of a rental premises in a clean and proper condition.
- (4) Provide and maintain the following items in a rental premises in good and safe working condition, if provided on the premises at the time the rental agreement is entered into:
 - (A) Electrical systems.
 - (B) Plumbing systems sufficient to accommodate a reasonable supply of hot and cold running water at all times.
 - (C) Sanitary systems.
 - (D) Heating, ventilating, and air conditioning systems. A heating system must be sufficient to adequately supply heat at all times.
 - (E) Elevators, if provided.
 - (F) Appliances supplied as an inducement to the rental agreement.¹⁹⁹

The tenant's remedies under the statute for a failure of the landlord to comply with these obligations are condition upon first giving written notice to

194. IND. CODE § 32-31-8-5 (Supp. 2002).

195. *Id.* § 32-31-7-5.

196. Unfortunately the phrase "dwelling units" is not defined in the statute. However, the definitions of the Security Deposit statute, *id.* §§ 32-3-1 to -19, which includes a definition of "rental unit," *id.* § 32-31-3-8, are to apply to the Landlord/Tenant Act of 2002. *See id.* §§ 32-31-7-2 and 32-31-8-2. On the other hand, the statute governing the modification of rental agreements and tenant's access to the rented premises uses the phrase "dwelling unit." *Id.* § 32-31-5-3. Perhaps a technical correction bill is necessary in order to clarify these terms and make them consistent throughout the Code.

197. *Id.* §§ 32-31-7-1 and 32-31-8-1.

198. *Id.* §§ 32-31-7-4 and 32-31-8-4.

199. *Id.* § 32-31-8-5.

landlord and then giving the landlord a reasonable time to complete the repairs.²⁰⁰ The tenant may recover the tenant's actual and consequential damages for landlord's breach, as well as attorney's fees, injunctive relief and any other relief which is "appropriate under the circumstances."²⁰¹

On the other hand, a tenant must comply with all health and housing codes to the extent they impose obligations primarily on the tenant, keep the rental premises reasonably clean, use the facilities and systems landlord is obligated to maintain in a reasonable manner, refrain from defacing or damaging the rental premises and comply with reasonable rules and regulations of the landlord.²⁰² In addition, the tenant must vacate the rental premises at the end of the lease term in a "clean and proper manner."²⁰³

The landlord's remedies for tenant's breach of these obligations are likewise conditioned upon prior written notice given to the tenant and a reasonable time to remedy the problem, unless the rental agreement has terminated.²⁰⁴ If the non-compliance has caused physical damage to the rental premises, then the landlord must give notice to the tenant specifying the repairs needed and documenting the landlord's cost in making such repairs.²⁰⁵ The landlord may recover actual damages from the tenant (but apparently not consequential damages), as well as attorney's fees, injunctive relief and any other relief which is "appropriate under the circumstances."²⁰⁶ The statute does not provide an independent right of the landlord to terminate the rental agreement of a tenant for non-compliance with the tenant's requirements in this statute. Ostensibly, it would be a remedy which is "appropriate under the circumstances" if a court should so find. Landlords will likely be making non-compliance with this statute an additional event of default under the lease, which would have the effect of giving the landlord the right to terminate the lease for non-compliance.

B. Recodification of Title 32

In its 2002 regular session, the Indiana General Assembly recodified Title 32 of the Indiana Code through Senate Enrolled Act 57. The 450-page act made tens of thousands of technical changes to the Code for the purpose of "[recodifying] prior property law in a style that is clear, concise, and easy to

200. *Id.* § 32-31-8-6(b)(6).

201. *Id.* § 32-31-8-6(d).

202. *Id.* § 32-31-7-5.

203. *Id.* § 32-31-7-6.

204. *Id.* § 32-31-7-7(b)(1).

205. *Id.* Unfortunately, the legislature did not utilize the same language in this section as in the Securities Deposit statute which requires a landlord to provide notice to a tenant specifying damages at the termination of the occupancy of the tenant in order to utilize any portion of the tenant's security deposit to effect such repairs. *Id.* § 32-31-3-14. The case law is developing standards for this type of notice which could easily be relied upon to determine the sufficiency of a landlord's notice under IND. CODE § 32-31-7-7.

206. *Id.* § 32-31-7-7(f).

interpret and apply.”²⁰⁷ Essentially, the recodification reorganized statutes and attempted to clarify confusing or arcane language.

Unfortunately, one result of the recodification process was the merging of two chapters, one which had previously expressly controlled over the other, in a manner which creates ambiguity regarding the rights of non-citizens, or aliens, to acquire, own and dispose of real property located in Indiana.²⁰⁸ Essentially, Indiana Code section 32-22-2²⁰⁹ contains statutes which reflect two different paradigms concerning the right of aliens to own real property in Indiana. Indiana Code sections 32-22-2-5 and 32-22-2-6²¹⁰ grant full property rights to all aliens, while Indiana Code sections 32-22-2-2 through 32-22-2-4²¹¹ grant different rights to aliens depending upon whether or not they have declared their intention to become citizens. After the survey period, the Indiana General Assembly enacted legislation repealing Indiana Code sections 32-22-2-2 through 32-22-2-4 and 32-22-2-6, effective July 1, 2003. As a result, aliens currently have full property rights in Indiana.

VI. INDEX OF OTHER CASES

A number of cases handed down by the Indiana Court of Appeals and Indiana Supreme Court this year clarified an existing principle of law but were not, in the opinion of the authors of this Article, significant enough to warrant analysis. As a tool for practitioners, we have included this section as a guide to those opinions handed down between October 1, 2001, and September 30, 2002, which may be relevant to their practice.

In *Allstate Insurance Co. v. Dana Corp.*,²¹² the supreme court held that ground water is the property of the landowner regardless of the landowner's assertion of control over it.

In *Bowling v. Poole*,²¹³ the court of appeals held that a purchase agreement constituted a sale of the property in gross, rather than on a per-acre basis notwithstanding that the seller was mistaken as to the number of acres of property to be sold.

In *Bradley v. City of New Castle*,²¹⁴ the supreme court held that if the requirements of Indiana Code section 36-4-3-13²¹⁵ are met, a court must order annexation and may not refuse to do so based upon procedural irregularities that do not impinge on remonstrators' substantive rights, because “a remonstrator's

207. *Id.* § 32-16-1-2.

208. For a thorough discussion of this issue, see William E. Marsh & Tanya D. Marsh, *Restrictions on Alien Property Rights in Indiana: Contradictory and Unconstitutional*, RES GESTAE, Jan./Feb. 2003, at 19.

209. IND. CODE § 32-22-2 (Supp. 2002).

210. *Id.* §§ 32-22-2-5, -6.

211. *Id.* §§ 32-22-2-5 to -4.

212. 759 N.E.2d 1049 (Ind. 2001).

213. 756 N.E.2d 983 (Ind. Ct. App. 2001).

214. 764 N.E.2d 212, 215 (Ind. 2002).

215. IND. CODE § 36-4-3-13 (Supp. 2002).

challenge to annexation is not a regular lawsuit, but rather a special proceeding the General Assembly may control.”²¹⁶

In *Circle Centre Development Co. v. Y/G Indiana, L.P.*,²¹⁷ the court of appeals upheld a lease provision in which the tenant affirmed that it was not relying on any statements or representations of the landlord regarding the space leased other than as expressly stated in the lease.

In *Citicorp Vendor Finance, Inc. v. WIS Sheet Metal, Inc.*,²¹⁸ the district court held that a contractual provision requiring the payment of attorney’s fees in a stated percentage of the amount delinquent on the contract is an unenforceable penalty as it does not approximate actual damages.

In *Cockrell v. Hawkins*,²¹⁹ the court of appeals held that O’s 1/120th interest in Blackacre was not sufficient to establish unity of title with the adjoining Whiteacre, owned entirely by O, for the purpose of creating an easement by necessity through Whiteacre to Blackacre after P purchased fee simple title to Blackacre.

In *Cyr v. Yoder, Inc.*,²²⁰ the court of appeals held that the Home Improvement Act applies to residential home improvement contracts even where the amounts due under the contract will be paid with insurance proceeds.

In *Encore Hotels of Columbus, LLC v. Preferred Fire Protection*,²²¹ the court of appeals found that a project owner was unjustly enriched in failing to pay a subcontractor the compensation to which it was entitled.

In *Floyd v. Rolling Ridge Apartments*,²²² the court of appeals held that a landlord did not fail to comply with the Indiana Security Deposit statute in providing a notice at the end of the renewed term of the lease as the renewal itself was a continuation of the initial lease and not a new lease.

In *Fort Wayne v. Certain Southwest Annexation Area Landowners*,²²³ the supreme court held that “courts reviewing annexation challenges should focus on whether the municipality made credible and enforceable commitments to provide equivalent services to similar areas. Courts are not authorized to dissect the minutiae of what are essentially legislative decisions.”

In *Kopinski v. Health and Hospital Corp. of Marion County*²²⁴ the court of appeals held that an enforcement authority may not issue a demolition order for a home which, following a fire, is structurally sound and repairable if the owner is making reasonable efforts to repair the property.

In *Luhnnow v. Horn*,²²⁵ the court of appeals held that a landowner is not a third party beneficiary to a contract entered into by a county drainage board with

216. *Bradley*, 764 N.E.2d at 215.

217. 762 N.E.2d 176 (Ind. Ct. App.), *trans. denied*, 774 N.E.2d 518 (Ind. 2002).

218. 206 F. Supp. 2d 962 (S.D. Ind. 2002).

219. 764 N.E.2d 289 (Ind. Ct. App. 2002).

220. 762 N.E.2d 148 (Ind. Ct. App. 2002).

221. 765 N.E.2d 658 (Ind. Ct. App. 2002).

222. 768 N.E.2d 951 (Ind. Ct. App. 2002).

223. 764 N.E.2d 221, 229 (Ind. 2002).

224. 766 N.E.2d 454 (Ind. Ct. App. 2002).

225. 760 N.E.2d 621 (Ind. Ct. App. 2001).

respect to replacement of drainage tiles within the drainage board's easement area adjacent to a legal drain and that the drainage board itself is a landowner to the extent of such easement for purposes of application of the "common enemy doctrine."

In *Macklin v. United States*,²²⁶ the U.S. Court of Appeals for the Seventh Circuit held that a property owner's claims against the IRS were barred as not timely filed.

In *Mercantile National Bank v. First Builders of Ind., Inc.*,²²⁷ the supreme court overruled a court of appeals decision holding that a subcontractor could recover from the owner of property in which it holds a mechanics lien regardless of the net damages due to the owner from the prime contractor.

In *Murdock Construction Management v. Eastern Star Missionary Baptist Church, Inc.*,²²⁸ the court of appeals held that a construction manager is not entitled to a mechanic's lien to secure the fee due it for providing its construction management services.

In *Network Towers, LLC v. Board of Zoning Appeals of LaPorte County*,²²⁹ the court of appeals held that the undocumented opinions of remonstrators that wireless communication tower would adversely affect their property values was not evidence upon which the board of zoning appeals could deny an application for a conditional use permit.

In *PCL/Calumet v. Entercitement, LLC*,²³⁰ the court of appeals held that certain mortgages had priority over a mechanic's lien.

In *Ransburg v. Richards*,²³¹ the court of appeals held that an exculpation clause in a residential lease whereby the tenant waives claims against the landlord based upon the condition of the premises is void as against public policy to the extent that it applies in the event of the negligence of the landlord because of long-standing rules of tort liability in the landlord-tenant relationship.

In *Schuman v. Kobets*,²³² the court of appeals held that consequential damages are not available in an action by a tenant against the landlord for breach of the implied warranty of habitability.

In *SPCA v. City of Muncie*,²³³ the court of appeals held that a Muncie zoning ordinance prohibits an owner from expanding a non-conforming use beyond the original footprint of the building or structure, unless such expansion is "incidental" to the non-conforming use.

In *State v. Bishop*,²³⁴ the court of appeals held that consistent with *Daugherty v. State*,²³⁵ that a trial court has the discretion to disallow a party's request to

226. 300 F.3d 814 (7th Cir. 2002).

227. 774 N.E.2d 488 (Ind. 2002).

228. 766 N.E.2d 759 (Ind. Ct. App. 2002).

229. 770 N.E.2d 837 (Ind. Ct. App. 2002).

230. 760 N.E.2d 633 (Ind. Ct. App. 2001), *trans. denied*, 783 N.E.2d 697 (Ind. 2002).

231. 770 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 783 N.E.2d 700 (Ind. 2002).

232. 760 N.E.2d 682 (Ind. Ct. App.), *trans. denied*, 774 N.E.2d 515 (Ind. 2002).

233. 769 N.E.2d 669 (Ind. Ct. App. 2002).

234. 775 N.E.2d 335 (Ind. Ct. App. 2002), *vacated*, 2003 Ind. LEXIS 169 (Ind. 2003).

235. 699 N.E.2d 780 (Ind. Ct. App. 1998).

withdraw its previously-filed exceptions in an eminent domain case, but it should allow the withdrawal of exceptions except in cases where injustice would result.)

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,²³⁶ the Supreme Court held that a temporary moratorium on developing real property does not constitute a per se partial taking requiring compensation under the Takings Clause of the United States Constitution.

In *Town of Lizton v. Storm*,²³⁷ the court of appeals held that a municipality may not simultaneously annex parcels of land which adjoin each other when only one adjoins the municipality itself.

In *Vadas v. Vadas*,²³⁸ the supreme court held that a couple had only "speculative" interest in their home, owned by husband's father, because there was no purchase agreement or other evidence of present intention to transfer the house to couple after they "got back on their feet financially."

236. 122 S.Ct. 1465 (2002).

237. 769 N.E.2d 622 (Ind. Ct. App. 2002).

238. 762 N.E.2d 1234 (Ind. 2002).



RECENT DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

The 112th General Assembly, the Governor of Indiana, the Indiana Supreme Court, and the Indiana Tax Court contributed changes to the Indiana tax laws in 2001. This Article highlights the major developments that occurred throughout the year.¹

I. INDIANA GENERAL ASSEMBLY LEGISLATION

The Special Session 112th Indiana General Assembly ("General Assembly") passed one key bill that broadly affected several provisions throughout the Indiana Code relating to taxation. This section will highlight the major changes with particular attention to gaming taxes, property taxes, sales and use taxes, motor fuel and vehicle excise tax, tobacco products taxes, and various other state income tax provisions.

1. *Gaming Tax*.—The General Assembly provided that a riverboat may implement a flexible schedule² after submitting a plan and obtaining the approval of the Gaming Commission.³ With this schedule, it then permitted a riverboat to conduct gambling games and to allow passengers steady ingress and egress for gambling while the riverboat is docked. Moreover, the General Assembly maintained the \$3 admissions tax for each person admitted to a riverboat that does not use a flexible schedule.⁴ With a flexible schedule, however, it required an admission tax only on the turnstile count of people boarding the riverboat.⁵ In the event that all riverboats implement flexible boarding, the Legislative Services Agency projects that admissions tax revenue may fall below the levels required for state and local distributions by \$38 million in fiscal year 2003, \$36.2 million in fiscal year 2004, and \$34.4 million in fiscal year 2005.⁶

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1. For comprehensive information concerning the Indiana Tax Court, the Indiana Department of State Revenue, the Indiana State Board of Tax Commissioners, and a variety of other tax-related information, visit the Access Indiana website at <http://www.ai.org>.

2. See IND. CODE § 4-33-6-10 (2003). Flexible schedule refers to the practice of conducting gambling games and allowing the continuous ingress and egress of passengers for the purpose of gambling while a riverboat is docked. IND. CODE § 4-33-2-7.5 (2003).

3. See *id.* § 4-33-6-21.

4. *Id.* § 4-33-12-1.

5. *Id.*

6. See Legislative Services Agency, Fiscal Impact Statement 12, June 21, 2002, available at <http://www.state.in.us/serv/> (last visited Apr. 24, 2003) [hereinafter Fiscal Impact Statement].

The General Assembly also implemented a graduated wagering tax in the case of a riverboat with a flexible schedule. It set the bottom rate at 25% for adjusted gross receipts below \$25 million and the top rate set at 35% for adjusted gross receipts in excess of \$150,000,000.⁷ In contrast, the General Assembly increased the wagering tax rate from 20% to 22.5% of the adjusted gross receipts for a riverboat without a flexible schedule.⁸ Assuming that all riverboats implement a flexible schedule, the Legislative Services Agency predicts that this change will impact the property tax replacement fund by \$381.1 million in fiscal year 2003, \$407.1 million in fiscal year 2004, and \$434.1 million in fiscal year 2005.⁹

2. *Property Tax*.—The General Assembly increased the standard property tax deduction for homesteads from \$6000 to \$35,000.¹⁰ It also increased the homestead credit rate from 10% to 20% commencing in 2003.¹¹ The General Assembly likewise stipulated that this credit be determined after the property tax replacement credit is applied. Hence, the homestead credit is indirectly linked to changes made in the property tax replacement credit.

Focusing on the property tax replacement credit,¹² the General Assembly maintained the credit rate at 20%, but narrowed the classes of qualifying property.¹³ Specifically, it only qualified real property, mobile homes, and non-business personal property and excluded business personal property.

On the subject of inventory,¹⁴ the General Assembly established an exemption for certain inventory that is either (1) altered into a new form and intended to be shipped to a destination outside Indiana; or (2) incorporated into personal property that will be shipped to a destination outside Indiana.¹⁵ It also established a 100% property tax deduction for the assessed value of inventory

7. See IND. CODE § 4-33-13-1.5 (2003).

8. *Id.* § 4-33-13-1.

9. See Fiscal Impact Statement, *supra* note 6, at 11.

10. See IND. CODE § 6-1.1-12-37 (2003). Homestead is defined as “an individual’s principal place of residence which A) is located in Indiana; B) the individual owns or is buying under a contract, recorded in the county recorder’s office, that provides that he is to pay property taxes on the residence, and C) consists of a dwelling and the real estate, not exceeding one (1) acre, that immediately surrounds the dwelling.” *Id.* § 6-1.1-20.9-1.

11. See *id.* § 6-1.1-20.9-2.

12. The State of Indiana provides each taxing unit with a percentage of its tax levies attributable to certain property in order to offset the amount of property taxes required from each taxpayer. Each taxing unit may, in turn, provide a credit to the taxpayer equal to this percentage offset. See INDIANA LEGISLATIVE SERVICES AGENCY OFFICE OF FISCAL AND MANAGEMENT ANALYSIS, INDIANA HANDBOOK OF TAXES, REVENUES, AND APPROPRIATIONS 87 (fiscal year 2002).

13. See IND. CODE § 6-1.1-21-2d (2003).

14. “Inventory” means “(1) materials held for processing or for use in production; (2) finished or partially finished goods of a manufacturer or processor; and (3) property held for sale in the ordinary course of trade or business.” *Id.* § 6-1.1-3-11.

15. *Id.* § 6-1.1-10-29b.

beginning with assessments made in fiscal year 2006.¹⁶ The General Assembly then authorized a county to allow this same 100% deduction for assessments made before January 1, 2006.¹⁷ According to the Legislative Services Agency, this exemption alone is likely to total \$6.25 billion in taxes for calendar years 2004, 2005, and 2006 collectively.¹⁸ When combined with the deduction in 2007, the agency predicts an estimated \$17.1 billion loss in of property tax revenue.

Finally, the General Assembly repealed the \$37,500 business personal property tax credit.¹⁹ The Legislative Services Agency predicted that the cost of this credit would reach \$96.0 million in fiscal year 2004 and \$97.9 million in fiscal year 2005.²⁰

3. *Sales and Use Tax.*—The General Assembly increased the sales and use tax from 5% to 6% effective December 1, 2002.²¹ The Legislative Services Agency estimated that this increase will generate approximately \$393 million in fiscal year 2003, \$806.4 million in fiscal year 2004, and \$827.4 million in fiscal year 2005.²² The General Assembly also amended the distribution of revenue generated as a result of this tax increase.²³ The statute requires that 50% of the revenue generated be deposited into the property tax replacement fund; 49.192% paid into the state general fund; 0.633% directed to the public mass transportation fund; and the remaining 0.142% placed into the commuter rail service fund.²⁴

4. *Motor Fuel and Vehicle Tax.*—The General Assembly increased the gasoline tax by three cents per gallon from fifteen cents to eighteen cents.²⁵ Per the Legislative Services Agency, the revenue raised from each penny increase will result in approximately \$32.1 million in 2003, \$32.7 million in 2004, and

16. *Id.* § 6-1.1-12-42. “Assessed value of inventory” means the value of inventory determined after application of any deductions or adjustments that apply by either statute or rule for assessing inventory. *Id.*

17. *Id.* § 6-1.1-12-41.

18. See Fiscal Impact Statement, *supra* note 6, at 15.

19. See IND. CODE § 6-3-3-2b (2003). “Business personal property” means tangible personal property (other than real property) being held (1) for sale in the ordinary course of a trade or business; or (2) held, used, or consumed in connection with the production of income, excluding inventory. *Id.* § 6-1.1-21-2.

20. See Fiscal Impact Statement, *supra* note 6, at 10.

21. See IND. CODE § 6-2.5-6-7 (2003). Sales and use tax is applied to the purchase of all tangible personal property, public utility services, rent of rooms or other accommodations for less than thirty days, and other types of property rental. See INDIANA LEGISLATIVE SERVICES AGENCY OFFICE OF FISCAL AND MANAGEMENT ANALYSIS, INDIANA HANDBOOK OF TAXES, REVENUES, AND APPROPRIATIONS 53 (fiscal year 2002).

22. See Fiscal Impact Statement, *supra* note 6, at 11 (estimating that the sales tax revenue will grow 2.6% annually in 2003, 2004, and 2005).

23. See IND. CODE § 6-2.5-10-1 (2003).

24. *Id.*

25. *Id.* § 6-6-1.1-201b.

\$33.3 million in 2005.²⁶ A three cents per gallon increase will thus result in even higher revenue—\$48.15 million in fiscal year 2003, \$97.2 million in fiscal year 2004, and \$99 million in fiscal year 2005.²⁷

5. *Tobacco Products Taxes.*—The General Assembly increased the tax on cigarettes from \$0.155 per pack to \$0.555 per pack, translating into an increase of \$0.0275 per individual cigarette.²⁸ This increase will likely result in \$268.2 million in fiscal year 2003, \$293.5 million in fiscal year 2004, and \$295 million in fiscal year 2005 based upon Legislative Services Agency forecasts.²⁹ It will be deposited into the state general fund. Additionally, the General Assembly increased the tax on the distribution of tobacco products from 15% to 18%.³⁰

6. *Other State Income Taxes.*—The General Assembly enacted changes to various other Indiana Code taxation provisions. It eliminated the gross income tax for all Indiana entities, except public utilities, beginning December 31, 2002.³¹ It removed, in turn, the corresponding credit afforded against the adjusted gross income tax for the gross income tax paid by a taxpayer. The General Assembly also repealed the supplemental net income tax.³²

These two modifications significantly altered the structure for corporate tax liability in Indiana. Under the Indiana Code, Indiana corporations were required to pay the greater of the gross income tax liability or the adjusted gross tax liability. In addition, Indiana corporations were responsible for supplemental net income tax.³³ Combined, the effective tax rate for a corporation paying both adjusted gross income tax and supplemental net income tax was therefore 7.747%.³⁴ To account for the loss in revenue due to the elimination of the gross income and supplemental net income taxes, the General Assembly increased the corporate adjusted gross income tax from 3.4% to 8.5% as of January 1, 2003.³⁵ The Legislative Services Agency expects that the impact of this rate change will yield \$28.6 million in fiscal year 2003 if corporations immediately adjust tax payments.³⁶ Nevertheless, the Legislative Services Agency anticipates that taxpayers will not adjust on time and that most taxpayers will not remit the full amount for the higher rate until after the end of their fiscal year. Thus, the bulk of the \$28.6 million will, in reality, be collected in fiscal year 2004.

26. See Fiscal Impact Statement, *supra* note 6, at 14.

27. *Id.*

28. See IND. CODE § 6-7-1-12 (2003).

29. See Fiscal Impact Statement, *supra* note 6, at 9.

30. See IND. CODE § 6-7-2-7 (2003).

31. *Id.* § 6-2.1.

32. *Id.* § 6-3-8b.

33. This tax was computed by reducing the adjusted gross income by the greater of the amounts paid in adjusted gross income tax, gross income tax, or premium tax. See INDIANA LEGISLATIVE SERVICES AGENCY OFFICE OF FISCAL AND MANAGEMENT ANALYSIS, INDIANA HANDBOOK OF TAXES, REVENUES, AND APPROPRIATIONS 18 (fiscal year 2002).

34. See Fiscal Impact Statement, *supra* note 6, at 9.

35. IND. CODE § 6-3-2-1.

36. See Fiscal Impact Statement, *supra* note 6, at 9.

The General Assembly also established a tax on the gross income earned by public utilities from retail activity.³⁷ Such gross receipts will be taxed at a rate of 1.4%.³⁸ In addition to this new utilities receipts tax, public utilities will continue to pay the corporate adjusted gross income tax. They will not, however, be required to pay the supplemental net income tax as mentioned above. Therefore, the Legislative Services Agency predicts that the overall effect of these tax changes on utilities will result in \$58.2 million additional revenue from public utilities in calendar year 2003.³⁹

Concerning the Hoosier Lottery, the General Assembly eliminated the adjusted gross income tax exemption for winnings received from a single ticket that exceed \$1200 as of July 1, 2002.⁴⁰ This means that any money in excess of \$1200 is taxable to the taxpayer lottery winner. Based on the winnings of \$1200 and higher distributed from 1999 to 2001, the Legislative Services Agency expects that this tax will generate annual income of approximately \$3.9 million starting in fiscal year 2003.⁴¹

Similarly, the General Assembly established procedures for withholding adjusted gross income taxes from both riverboat gambling winnings of (1) \$1200 or more from slot machine play; and (2) \$1500 or more from a keno game.⁴² That is, riverboat casino owners are required to withhold and remit adjusted gross income tax on such winnings. The General Assembly also required payment of this tax on the next business day following the win.⁴³ This tax is projected to increase Indiana revenue by nearly \$15 million beginning in fiscal year 2003.⁴⁴

At the same time that the General Assembly enacted means to increase revenue, it also enhanced the credits available to taxpayers. Specifically, the General Assembly increased the renter's deduction from \$2500 beginning in tax year 2003.⁴⁵ This provision previously allowed a taxpayer to deduct an amount equal to the total rent paid during a tax year up to \$2000 so long as such rent deduction was made of the taxpayer's principal place of residence. Such increase probably will result in a loss of revenue totaling \$10.9 million in fiscal year 2004 and \$11.1 million in fiscal year 2005 per the Legislative Services Agency.⁴⁶

Next, it extended the research expense credit through 2004.⁴⁷ In allowing for this extension, it eliminated the apportionment formula previously set forth in the

37. See IND. CODE § 6-2.3-2-1 (2003).

38. *Id.* § 6-2.3-2-2.

39. See Fiscal Impact Statement, *supra* note 6, at 9.

40. See IND. CODE § 6-3-2-14.5 (2003).

41. See Fiscal Impact Statement, *supra* note 6, at 9.

42. See IND. CODE § 6-3-4-8.2 (2003) (keno winnings are calculated by reducing net winnings by the amount wagered).

43. *Id.*

44. See Fiscal Impact Statement, *supra* note 6, at 11.

45. See IND. CODE § 6-3-2-6 (2003).

46. See Fiscal Impact Statement, *supra* note 6, at 10.

47. See IND. CODE § 6-3.1-4 (2003).

Indiana Code.⁴⁸ Under this formula, a taxpayer's credit was based on the lesser of its Indiana qualified research expenses and its apportioned research expenses. The General Assembly's instead modified the apportionment provision to base the credit solely on the taxpayer's Indiana qualified research expenses.⁴⁹ As well, the General Assembly increased the credit from 5% to 10%.⁵⁰ This change would thus lower the tax liability for multi-state, Indiana-domiciled companies that perform significant research within Indiana. Indiana revenue through 2004 is likely to drop as result. Nevertheless, as a counterpoint, the research that is promoted by this credit will likely generate gross income via hiring additional employees and sales tax via purchasing research equipment.⁵¹

The General Assembly extended the earned income tax credit through tax years 2005 and set the credit rate at 6% of the federal earned income tax credit.⁵² The Legislative Services Agency estimated that 105,000 taxpayers were entitled to claim the credit as of 1999 and that the base cost for this number was \$17.5 million. Using these figures, the Legislative Services Agency predicts the new rate will increase the base cost of the credit by \$8.7 million in fiscal year 2003, \$21.4 million in fiscal year 2004, and \$22.7 million in fiscal year 2005.⁵³

Lastly, the General Assembly established a venture capital investment tax credit for qualified venture capital investment beginning in tax year 2004 and ending in tax year December 31, 2008.⁵⁴ A taxpayer is entitled to a non-refundable tax credit equal to the lesser of: (1) 20% of qualified investment capital provided to a qualified Indiana business⁵⁵ during a calendar year or (2) \$500,000. The General Assembly limited the total tax credits claimed collectively by all Indiana taxpayers to \$10 million per year.⁵⁶ Therefore, claims for the credit may not be approved once the annual maximum of \$10 million is reached. The General Assembly also permitted the credit to be applied against any individual taxpayer's state gross retail and use tax, adjusted gross income tax, financial institutions tax, or insurance premiums tax liability.⁵⁷ Moreover, in the event that the amount of credit exceeds the taxpayer's liability, the General Assembly provided that the excess credit may be carried forward and applied in subsequent tax years until exhausted. It did, however, not permit the excess

48. *Id.*

49. *Id.*

50. *Id.* This credit is available to an individual taxpayer who (1) claims a qualifying dependant; (2) has a total income of less than \$12,000 per year; and (3) earns at least 80% of the income. See INDIANA LEGISLATIVE SERVICES AGENCY OFFICE OF FISCAL AND MANAGEMENT ANALYSIS, INDIANA HANDBOOK OF TAXES, REVENUES, AND APPROPRIATIONS 34 (fiscal year 2002).

51. See Fiscal Impact Statement, *supra* note 6, at 10.

52. See IND. CODE § 6-3.1-21 (2003).

53. See Fiscal Impact Statement, *supra* note 6, at 9.

54. See IND. CODE § 6-3.1-24 (2003).

55. A business must apply to the Indiana Department of Commerce for certification as a "qualified business" for purposes of the tax credit. Fiscal Impact Statement, *supra* note 6, at 8.

56. See IND. CODE § 6-3.1-24 (2003).

57. *Id.*

credit to be either carried back and applied to prior tax years or refunded. Lastly, the General Assembly enabled the shareholders, partners, or members of a pass-through entity to utilize the credit in proportion to their distributive income.⁵⁸ The Legislative Services Agency estimates that this credit may reduce revenue by \$5 million in fiscal year 2004 and \$10 million annually each year thereafter.⁵⁹

II. INDIANA SUPREME COURT DECISIONS

During the time period of October 1, 2001, to September 30, 2002, the Indiana Supreme Court decided four taxation related cases. The first case involved the role of a tax representative before the State Board of Tax Commissioners ("State Board"). The second case pertained to the methodology used by the State Board in assigning a grade factor to a mansion-like, private dwelling for property tax valuation purposes. The third case addressed whether a non-profit organization was entitled to a charitable use property tax exemption, and the fourth case dealt with the application of the exclusionary rule to a controlled substance excise tax proceeding. Each decision is further detailed below.

1. *State ex rel. Indiana State Bar Ass'n v. M. Drew Miller*.⁶⁰—Pursuant to Indiana Admission and Discipline Rule 24, the Indiana State Bar Association ("Bar Association") brought suit against M. Drew Miller ("Miller") for the unauthorized practice of law based upon Miller's conduct as a "tax representative" before the State Board.⁶¹ In 1992, Hoogenboom contracted with Landmark Appraisal, Inc., which is solely owned by Miller, to challenge the tax valuation of several properties. The contract provided that Landmark would research, examine, and evaluate the properties to determine whether the assessment was excessive. In such case, Landmark would then seek a reduction on behalf of Hoogenboom and earn 50% of any tax savings.

In 1996, Miller challenged the tax valuation of one of Hoogenboom's office building before the State Board. He centered his argument on four specific challenges as follows: (1) the valuation violated Article X, Section 1 of the Indiana State Constitution; (2) the obsolescence depreciation factor of 0% was too low; (3) the property grade of C-1 was improper; and (4) the physical depreciation factor of 25% was too low.⁶² The State Board rejected Miller's arguments and determined that the assessments were correct. Hoogenboom attempted to appeal the State Board's decisions to the Indiana Tax Court ("Tax Court"). The attempted appeal was, however, unsuccessful in part because Miller failed to place certain responses to interrogatories into the record at the State Board hearing.

Before the Indiana Supreme Court, the Bar Association contended that the

58. See IND. CODE § 6-3.1-24 (2003).

59. See Fiscal Impact Statement, *supra* note 6, at 13.

60. 770 N.E.2d 328 (Ind. 2001).

61. *Id.* at 329.

62. *Id.* at 330.

Article X challenge involved a question of law. It also stipulated that the remaining three challenges required an analysis of case law because State Board regulations did not fully explain the evidence necessary to prove the factor assignments. The supreme court agreed with the Bar Association's position regarding the constitutional claim.⁶³ Nevertheless, it disagreed with Bar Association as to the other challenges.⁶⁴ The supreme court concluded that the use of court opinions to answer questions about obsolescence and depreciation factors did not constitute the practice of law.

In addition, the court refused to enjoin Miller from practicing before the State Board.⁶⁵ It reasoned that the rules governing the State Board,⁶⁶ which became effective in 2001 following the Hoogenboom appeal, would prevent Miller from engaging in the unauthorized practice of law as a tax representative in the future. The supreme court particularly noted that a tax representative may not practice before the State Board in actions with claims that (1) assessments or taxes are "illegal as a matter of law;" or (2) pertain to the constitutionality of an assessment or any other representation that involves the practice of law.⁶⁷ Lastly, the court acknowledged that a tax representative must inform a prospective client in writing that he/she is not an attorney, is not licensed to present legal arguments, and may not address legal issues relating to a tax assessment.⁶⁸

2. *State Board of Tax Commissioners v. Juan C. and Maria N. Garcia*.⁶⁹—Assessors assign a grade factor for tax valuation ranging from "A" to "E" based on a home's construction qualities and amenities in accord with the State Board regulations.⁷⁰ Grade "A" is the highest classification and defines a dwelling that is of "outstanding architectural style and design" and is "constructed with the finest quality materials and workmanship throughout."⁷¹ Such dwellings have a grade factor of 160% of the base price. In contrast, "C" grade dwellings are moderately attractive, constructed with average quality materials, and have a

63. *Id.*

64. *Id.*

65. *Id.* at 331.

66. The Indiana Administrative Code defines a "tax representative" as "a person who represents another person at a proceeding before the property tax assessment board of appeals, the division of appeals, or the Board." IND. ADMIN. CODE tit. 50, r. 15-5-5 (2001).

67. See 50 IND. ADMIN. CODE tit. 50, r. 50-15-5-2 (2001).

68. See 50 IND. ADMIN. CODE tit. 50, r. 15-5-5 (2001).

69. 766 N.E.2d 341 (Ind. 2002). As the Indiana Supreme Court decided this case, the State Board of Tax Commissioners were in the process of developing a new manual and guidelines for property tax assessments. The Board sought to establish a more objectively verifiable result that will satisfy the constitutional requirement of uniform and equal assessments. See State Board of Tax Commissioners, 2002 Real Property Assessment Manual 2 (2001). In addition, the State Board of Tax Commissioners was abolished as of January 1, 2002. Its duties were distributed to two new agencies: the Department of Local Government Finance for tax collection and the Indiana Board of Tax Review for review of property tax appeals. See IND. CODE §§ 6-1.5-1-3, 4-1 (2001).

70. *Garcia*, 766 N.E.2d at 345-46 (citing IND. ADMIN. CODE tit. 50, r. 2.1-3-4 (1992)).

71. *Id.*

grade factor of 100%.⁷² If a dwelling falls in between the classifications, then an assessor may assign pluses and minuses to further narrow grades.⁷³ Grades that fall above "A" may be indicated by "+1 through +10," and each increment above "A" represents an increase in value over the base grade of 20%.⁷⁴ The regulations also allow grades "A+4" and "A+10" to be designated as "AA" and "AAA," respectively.

With this general background regarding tax valuation, Juan and Maria Garcia ("the Garcias") reside in an 11,000 square foot dwelling in South Bend, Indiana.⁷⁵ When their home was constructed in 1991, the actual building cost was \$1,634,543. The township tax assessor originally assigned a grade "A+10" to their home. Upset with this grade, the Garcias petitioned the County Board of Review ("County Board") for re-evaluation. The County Board determined that the assessment was entirely proper.

The Garcias then filed a Petition for Review of Assessment with the State Board in March 1994. Following a hearing, the State Board found that the Garcias' home deserved an elevated "A" grade, but reduced the actual assessment to "A+4."⁷⁶ The Garcias remained, nevertheless, displeased with the grade assignment and petitioned to the Tax Court. This court found that the State Board employed an arbitrary and capricious methodology in grading dwellings above an "A" and remanded the case to the State Board for further considerations.⁷⁷

Upon remand, the Board revised the grade using a four-step process.⁷⁸ First, the Board considered the actual construction cost of the home and subtracted either (1) items not assessed in Indiana; or (2) items assessed as separate line items. Second, the Board equated the 1991 construction cost with 1985 data since the regulations concerning grades were based upon 1985 reproduction costs. Third, the State Board noted that the 1985 cost schedule was further reduced by 15% and therefore reduced the revised reproduction cost this amount. Following this computation, the Garcias' construction cost totaled \$629,854. Fourth, the State Board calculated that a grade "C" would have a reproduction cost of \$217,900. Using this calculation for comparison, it then determined that the Garcias' home of \$629,854 should be afforded a final grade of "A+6."

Still unsatisfied, the Garcias again petitioned to the Tax Court. The Tax Court reasoned that neither the regulations nor appraisal standards specifically provided a methodology for assessing a grade higher than "A."⁷⁹ Additionally, it stated that the regulations should be updated to include the instant calculation method if the Board wishes to use it in the future. Consequently, the Tax Court

72. *Id.* at 345.

73. *Id.* at 346.

74. *Id.* at 348 (citing IND. ADMIN. CODE tit. 50, r. 2.1-3-4(f) (1992)).

75. *Id.* at 346.

76. *Id.* at 342.

77. *Id.*

78. *Id.* at 346-47.

79. *Id.* at 342.

entered a grade "A" for the Garcias' home.

Following this second Tax Court decision, the Board petitioned to the Indiana Supreme Court for review. The supreme court recognized that the Tax Court owes deference to the executive body assigned principle responsibility a specific mission.⁸⁰ Under the instant facts, it determined that the State Board has such principle responsibility for tax valuation based on the Indiana Code. In particular, the supreme court noted that duties of the State Board include: (1) interpreting the property tax laws of this state; (2) instructing property tax officials about their taxation and assessment duties and ensuring that the county assessors, township assessors, and assessing officials are in compliance the Code; (3) verifying that all property assessments are made in the manner provided by law; and (4) developing and maintaining a manual for assessing officials and county assessors.⁸¹

Next, the supreme court recognized that assessment regulations explicitly contemplate ten plus factors above grade "A" and that specific percentage multipliers are associated with these higher grades. That is, an "A" grade house has a multiplier of 160%, and an "A+6" house has a multiplier of 280%. It then noted that the regulations provide pictorial comparisons for homes in grades "E-1" up to "A," but only describe "A+4" grade houses or above as "mansion-type dwellings."⁸² In this regard, the supreme court appreciated that it would be nearly impossible to provide assessors with a picture of the absolute highest quality home. It thus focused not on the availability of a picture, but on the fact that the regulations contained a description and specific grade factors from which to work. Accordingly, the supreme court rejected the Garcias' argument that the Board did not contemplate a home of such high caliber and that it must assign only a grade "A." It found instead that the Board employed an "objective, logical method to assess a literally incomparable property within the existing guidance and that [t]his was not arbitrary or capricious."⁸³ The supreme court, as a result, overturned the Tax Court decision in favor of the Board.

3. *State Board of Tax Commissioners v. New Castle Lodge #147, Loyal Order of Moose*.⁸⁴—The New Castle Lodge #147 ("Lodge") applied for a property tax exemption in 1988 based upon the claim that its property is predominantly used for charitable purposes. The Lodge owns a 10,400 square foot building with a meeting/ballroom, game room, dining room, lounge, kitchen, and common areas. The Henry County Board of Review denied exemption status in 1992. The Lodge appealed this ruling to the State Board.

A Board Hearing Officer updated the "Room by Room Analysis of Exempt (Charitable) Activities" from the Lodge's application by assessing how many of the 1110 hours that the meeting/ballroom were open for charitable uses. He found that 67% of the total 1992 meeting/ballroom hours were for charitable

80. *Id.* at 348.

81. *Id.* (citing IND. CODE § 6-1.1-35-1 (1998)).

82. *Id.*

83. *Id.* at 349.

84. 765 N.E.2d 1257 (Ind. 2002).

purposes. The Officer also considered other written evidence of charitable activity such as the Lodge's Constitution, by-laws, articles of incorporation, 1991 federal Return of Organization Exempt From Tax form, and 1992 monthly member newsletters. He ultimately recommended an exemption of 63%.

Nonetheless, the State Board rejected this recommendation and denied an exemption. The State Board found as fact that the newsletter described only social activities and that all of the meeting/ballroom hours were for social functions. Moreover, it determined that the Lodge's 4% charitable contribution rate did not qualify for exemption status. In response to this ruling, Lodge appealed to the Tax Court. The Tax Court reversed that State Board's decision and held that the Lodge's uses of its facilities were predominantly for charitable functions.

The Indiana Supreme Court granted the State Board's petition for review to clarify the appropriate standard for the "predominant use" test. The supreme court employed a three-part analysis. It first reviewed the statutory language that gave rise to this test.⁸⁵ "All or part of a building is exempt from property taxation if it is owned, occupied, and used by a person for educational, literary, scientific, religious, or charitable purposes."⁸⁶ In determining whether property qualifies for an exemption under this language, it referred to Indiana Code section 6-1.1-10-36.3, which states that "property is predominantly used or occupied for [the] one or more [preceding] stated purposes if it is used or occupied for one or more those purposes during more than 50% of the time that it is used or occupied in the year that ends on the assessment date of the property."

As the second step in its analysis, the supreme court turned to the State Board's findings of fact concerning charitable activities.⁸⁷ It ruled these findings were simply wrong because the Lodge's newsletter expressly mentioned multiple charitable events including an Easter Seals campaign, donations to the local Disabled American Veterans, a campaign to raise for the city emergency warning system, and delivery of food and supplies to Hurricane Andrew victims.⁸⁸ More importantly, the supreme court determined that the State Board's finding regarding the use of the Lodge for social purposes contradicted the Hearing Officer's observations.⁸⁹ It additionally stated that the State Board did not cite any additional evidence or grounds to explain away the Officer's findings.

Finally, the supreme court addressed the State Board's conclusions of law in third step of its analysis. It reasoned that the Board both misstated and misapplied the law in considering charitable giving.⁹⁰ The Court acknowledged that charitable giving may serve as evidence of charitable use, but that the predominant use test is concerned only with use of the facility.⁹¹ Thus, the

85. *Id.* at 1259.

86. *Id.* (quoting IND. CODE § 6-1.1-10-16(a) (1989)).

87. *Id.* at 1262.

88. *Id.*

89. *Id.* at 1262-63.

90. *Id.* at 1263.

91. *Id.*

supreme court scolded the State Board for misleading the Lodge to document charitable giving by consistently citing such levels during its hearing. It then suggested that the State Board would have been justified to require the Lodge to produce facility usage reports in greater detail with better supporting documentation than those offered by the Lodge.

In reaching a remedy, the supreme court recognized that it would not be possible for the Lodge to prove charitable facility usage today in a remand hearing, especially since the State Board lead the Lodge to document charitable giving.⁹² Consequently, it concluded that the available evidence satisfied the predominant use test, thereby entitling the Lodge to a partial exemption. The supreme court therefore remanded the case to the State Board for a final determination of the Lodge's exemption application, with evidence limited to the Hearing Officer's recommendation.

4. *State of Indiana, Department of Revenue v. Dante Adams*.⁹³—The Indianapolis police obtained a search warrant for Dante Adams's ("Adams") safe deposit box based upon a tip from an Indianapolis bank that the odor of marijuana emanated from the box.⁹⁴ The police found cocaine in the box and charged Adams with dealing in cocaine and possession of cocaine. The Indiana Department of Revenue, in turn, issued a tax assessment against Adams pursuant to the Controlled Substance Excise Tax ("CSET").⁹⁵ Adams asserted, however, that the State could not assess the CSET because the cocaine was discovered during an illegal search and is barred from evidence under the exclusionary rule.

The supreme court began its opinion by referring to the conclusions of the United States Supreme Court in *Pennsylvania Board of Probation & Parole v. Scott*. In this case, the United States Supreme Court has held that exclusionary rule is "a judicially created means of deterring illegal searches and seizures."⁹⁶ As well, it determined that the rule is most effective when "its deterrence benefits outweigh its 'substantial social costs.'"⁹⁷ With this guidance, the Indiana Supreme Court compared the deterrence benefits with the costs in reaching its holding that the exclusionary rule does not apply to the evidence seized from Adams's safe deposit box for the CSET proceeding.

Focusing first on deterrence, the supreme court noted that revenue officers collect CSET assessments on illegal narcotics that are uncovered by police investigations. Thus, the supreme court deemed that the police would not be significantly deterred if evidence were excluded in a CSET proceeding because they are primarily concerned with criminal prosecutions.⁹⁸ Furthermore, it acknowledged that the police are more concerned with enforcement of criminal laws, not tax laws. On the other hand, the supreme court appreciated that

92. *Id.* at 1265.

93. 762 N.E.2d 728 (Ind. 2001).

94. *Id.* at 729.

95. *Id.*

96. *Id.* at 730 (quoting *Pa. Bd. Of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)).

97. *Id.*

98. *Id.* at 731.

revenue officers may be deterred somewhat if the exclusionary rule were applied to CSET proceedings.⁹⁹ Nevertheless, it reasoned that such circumstances would only rarely occur.

Concerning the costs, the supreme court concluded that application of the exclusionary rule in the CSET context would undermine many state interests.¹⁰⁰ It would impede that state's ability to exercise its power to tax and thereby prevent the state from performing necessary governmental functions. It would also enable taxpayers to avoid paying taxes. In addition, the state would lose evidence necessary to assess tax. In contrast, if drug evidence were suppressed in a criminal prosecution, then the state would likely have other evidence on which it could seal a conviction. Lastly, application of the exclusionary rule would require complicated legal determinations in frustration of the administration purpose of the proceeding.

III. INDIANA TAX COURT DECISIONS

The Indiana Tax Court ("Tax Court") rendered a variety of opinions from October 1, 2001, to September 30, 2002. In particular, the Tax Court issued twenty-seven published opinions, fourteen of which concerned Indiana real property tax matters. The remaining fourteen cases are divided as follows: five cases regarding Indiana tangible personal property tax; four cases regarding Indiana sales and use tax; one case regarding Indiana inheritance tax; two cases regarding Indiana motor carrier fuel tax; and one case regarding the hospital care for the indigent tax.. Each decision is summarized separately below.

A. Real Property Tax

1. *Irwin Mortgage Corp. v. Indiana Board of Tax Review*.¹⁰¹—Irwin is a mortgage company that maintains an escrow account on behalf of its customers for property tax payments.¹⁰² On May 12, 1997, Irwin was scheduled to pay a property tax installment to the County Treasurer's Office. Due to the absence of an employee on that day, Irwin failed to make the payment. On May 13, 1997, Irwin hand delivered the payment to the County Treasurer's Office. The County Treasurer considered the payment delinquent and imposed a 10% penalty pursuant to Indiana Code section 6-1.1-37-10.

Although Irwin paid the penalty, it later filed a claim for refund with the Marion County Auditor on January 5, 1998.¹⁰³ The Auditor denied a refund. Irwin then appealed to the State Board via a 131 Petition for Review on January 27, 1998. It argued that it was entitled to a refund of the penalty amount and that the statute under which the penalty was charged, namely Indiana Code section

99. *Id.*

100. *Id.*

101. 775 N.E.2d 720 (Ind. Tax Ct. 2001).

102. *Id.* at 721.

103. *Id.* at 722.

6-1.1-37-10, is unconstitutional.¹⁰⁴ The State Board rendered a decision stating that it did not have the authority to decide whether the Treasurer property imposed the penalty on Irwin.¹⁰⁵ Following the State Board's ruling, Irwin appeal to the Tax Court on March 12, 2002. The State Board,¹⁰⁶ in response, filed a motion to dismiss the appeal for failure to state a claim upon which relief may be granted in response.

The Tax Court was faced with the primary issue of determining whether the State Board has the authority to hear cases involving penalties on delinquent property tax installments. In addressing this issue, the Tax Court first recognized that the State Board is statutorily empowered to review appeals concerning one of four matters that stem from a determination by an assessing official or county property tax assessment board appeals.¹⁰⁷ These matters include (1) the assessed valuation of tangible property; (2) property tax deductions; (3) property tax exemptions; and (4) property tax credits. Thus, the Tax Court ruled that the statute does not grant any power to the State Board to review penalties imposed by the County Treasurer for late payment of property taxes. It suggested that Irwin might find a remedy, if any, with a court of general jurisdiction.¹⁰⁸

As a secondary issue, the Tax Court then turned to consider Irwin's assertion that Indiana Code section 6-1.1-37-10 is unconstitutional. Although Irwin relied on *State v. Sproles*¹⁰⁹ for the holding that challenges to tax law lie in the exclusive jurisdiction of the Tax Court, it found Irwin's reliance misplaced.¹¹⁰ It reasoned that an administrative agency may not review the constitutionality of a statute until the agency has jurisdiction over the appeal brought under the statute alleged to be unconstitutional. Consequently, it ruled that neither the State Board nor the Tax Court itself had any authority to rule on the appropriateness of the penalty and that the constitutional challenge was improper.¹¹¹

2. *Walker Manufacturing Co. v. Department of Local Government Finance*.¹¹²—Walker runs a manufacturing business in Ligonier, Indiana. It owns two parcels of land, parcel 155 and parcel 210 with an improvement on each. For the tax years 1989-1991, Walker filed three Form 133 Petitions for Correction of Error for parcel 155 with the County Board to address the excessive assessment of its improvement and the assessment of improvements that were

104. *Id.* at 720.

105. *Id.* at 722.

106. The Indiana legislature abolished the State Board as of December 31, 2001, and established the Department of Local Government Finance and the Indiana Board of Tax Review in its place. *See id.* at 722 n.2.

107. *Id.* at 723.

108. *Id.* at 724.

109. *See generally* 672 N.E.2d 1353, 1356 (Ind. 1996).

110. *Irwin*, 775 N.E.2d at 723.

111. *Id.* at 724.

112. 772 N.E.2d 1 (Ind. Tax Ct. 2001).

never made.¹¹³ Walker also challenged parcel 155's land classification. The County Board denied all petitions and forwarded them to the State Board for review.¹¹⁴ The State Board did not grant Walker relief with regard to his three Form 133 Petitions. In addition, it assessed certain yard improvements, which were not previously assessed. Due to the failure to timely initiate a tax appeal, the Tax Court dismissed Walker's original case for lack of subject matter jurisdiction.¹¹⁵

For the tax years 1990-91, Walker re-filed the same Form 133 Petitions. Both the County Board and State Board again denied the petitions.¹¹⁶ Consequently, Walker filed a Form 130 Petition for Review of Assessment for both parcels and improvements with the County Board for the 1992 tax year.¹¹⁷ The County Board denied the Form 130 Petitions on November 17, 1993. In response, Walker filed two Form 131 Petitions for Review of Assessment with the State Board, arguing that the assessment of the land and improvements for parcels 155 and 210 should have been reduced for tax year 1992. Walker supported his position by alleging that the land was improperly classified and that the improvements were entitled to grade and obsolescence adjustments. The State Board, nevertheless, refused to change the land classification, grade, or obsolescence. Walker then appealed the State Board's final determinations on its Form 131 and Form 133 Petitions.¹¹⁸

Considering the Form 133 Petitions, the Tax Court first noted that Walker failed to timely appeal its first series of Form 133 Petitions.¹¹⁹ It then ruled that Walker had not raised any new issues in his second series of Form 133 Petitions and that essentially Walker was "trying for a second bite at the apple."¹²⁰ The Tax Court reasoned that if it were to decide the present appeal, then it would nullify the forty-five day time limit for appealing a State Board final determination of a Form 133 Petition.¹²¹ Thus, it dismissed Walker's appeal of its Form 133 Petitions for lack of subject matter jurisdiction.

Turning to the Walker's second grounds for appeal, the Tax Court acknowledged that Walker had the burden of submitting probative evidence to establish a *prima facie* case regarding the assessments before triggering the State Board's duty to support its findings with substantial evidence.¹²² To this end, Walker offered an "Assessment Review and Analysis" generated by M. Drew Miller of Landmark Appraisals, Inc. for each parcel. Miller simply stated that parcel 155 should be classified as primary and assessed at \$24,450 and that specific sections of parcel 210 should be classified as primary, secondary, and

113. *Id.* at 3.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 4.

119. *Id.* at 6.

120. *Id.*

121. *Id.*

122. *Id.* at 7.

undeveloped, respectively, for a total value of \$32,730. He then stated that parcel 155 should be assigned a grade of D or 80% factor while parcel 210 should have a grade D-1 or 70% factor. Miller also recommended applying a 30% obsolescence factor to parcel 155. Lastly, he advocated that an obsolescence adjustment should be applied where an improvement's reproduction cost exceeds its market cost by 85% for parcel 210. The Tax Court decided that such evidence alone did not establish a *prima facie* case because Miller's statements were conclusory and not probative.¹²³ Thus, the Tax Court affirmed the State Board's final determinations of Walker's Form 131 Petitions.¹²⁴

3. *Damico v. Department of Local Government Finance*.¹²⁵—Damico, d/b/a Moulded Acoustical Products, ("Moulded") owns a light, pre-engineered manufacturing building with a 1080 square foot attached wood-frame in Elkhart County.¹²⁶ The light manufacturing area has a number of gas heating units suspended from the ceiling. The attached office area has a separate use from the manufacturing building. For the tax years 1990-94, the light manufacturing area and office area were assessed using the General Commercial Industrial (GCI) Light models. This model was customarily used to assess pre-engineered structures.¹²⁷ It was also assessed for central heating rather than for suspended gas heaters.¹²⁸ Furthermore, the improvement was assessed using two perimeter-to-area ratios (PAR). Specifically, the Cleveland Township Assessor assessed the light manufacturing area with a PAR of 2 using the GCI Light Manufacturing model and the office area with a PAR of 9 using the GCI Office model. Finally, it depreciated the improvement with a forty-year depreciation table for tax year 1990.

Moulded filed four Form 133 Petitions for Correction of Errors for the 1990-93 tax years. For the 1990 tax year, it argued that one PAR should have been calculated for the entire improvement and that a thirty-year depreciation table should have been used instead of the forty-year table. Moulded also stipulated that its facility should have been valued at \$195,560, not at \$293,770 as assessed. For the 1991-93 tax years, Moulded again argued the following three positions: (1) that only one PAR should have been calculated; (2) that it was assessed for partitioning that was not physically present; and (3) that it was assessed for central heating instead of for suspended gas heaters. Thus, it stated that the true value was \$125,700, an amount much lower than the Assessor's estimation of \$181,830. In response to these petitions, the County Board rejected Moulded's arguments, raised Moulded's assessment for the 1990 tax year, and made no changes to the 1991-93 assessment.¹²⁹

123. *Id.* at 7-8.

124. *Id.* at 8.

125. 769 N.E.2d 715 (Ind. Tax Ct. 2001).

126. *Id.* at 718.

127. *Id.* at 719.

128. *Id.* at 718.

129. *Id.*

Moulded appealed this denial to the State Board. The State Board assessed the property as \$277,570 for the 1990 tax year and \$157,230 for the 1991-93 tax years. In addition, it refused to decrease the assessment of the heaters or to assess the property using a single PAR.

Moulded next filed a Form 130 Petition for Review of Assessment for the 1994 tax year to challenge its PAR and assessment for partitioning. The Assessor assessed the property at \$181,830. Once again, the County Board rejected Moulded's contentions and raised the assessment to \$238,170. Moulded appealed and filed a Form 131 Petition for Review of Assessment with the State Board.¹³⁰ It argued on appeal that the light manufacturing area should have been given a kit building adjustment and discount for partitioning, finish, and walls. Accounting for these changes, it contended that the assessment should have been lowered to \$175,870. The State Board agreed to lower the overall assessment to \$185,770, but refused to assign a kit building adjustment or allow the requested discount.

Moulded combined its two appeals and brought four issues before the Tax Court: (1) whether the State Board should have applied the thirty-year physical depreciation table for the 1990-93 tax years; (2) whether the assessment for 1990-93 should be reduced because it included central heating when the property actually has suspended heating units; (3) whether the property should have been assessed with one PAR for the tax years 1990-93; and (4) whether the 1994 assessment should have included a kit building adjustment or should have been reduced because the partitioning, walls and finish were excessively assessed.¹³¹

Considering the first issue, the State Board insisted that its rules did not provide for the classification of "light pre-engineered." Instead, it claimed that it appropriately classified the property as "fire-resistant building not listed elsewhere," which required application of the forty-year depreciation table. The Tax Court noted that physical depreciation tables adjust the reproduction cost of a structure to account for its age and condition.¹³² For the tax year 1990, the Tax Court acknowledged that the State Board rules plainly provided for the application of the thirty-year depreciation table, not the forty-year table, to "light pre-engineered buildings" such as Moulded's. Accordingly, the Tax Court found that the State Board acted arbitrarily and capriciously when it refused to depreciate Moulded's light pre-engineered manufacturing building using thirty-year depreciation tables.¹³³

Second, the State Board argued that subjective judgment would be required to assess Moulded's heaters because its costs schedules do not list a cost for the type of heaters found in Moulded's light, pre-engineered building. Therefore, it asserted that Moulded improperly filed a Form 133 Petition. The Tax Court observed that improvements are assessed using models and that an assessor

130. *Id.* at 719.

131. *Id.* at 717-18.

132. *Id.* at 720 (citing IND. ADMIN. CODE tit. 50, r. 2-1-5-1 (1992)).

133. *Id.*

locates closest model and then matches it with a cost schedule.¹³⁴ Citing case precedent, it then stated that a taxpayer must show that the alleged error is objective and that it could be quantified using the State Board's cost schedules.¹³⁵ Consistent with Moulded's argument, the court found that as assessor could readily determine from a cursory inspection that the heaters were not part of a central heating system. However, it found that Moulded failed to quantify the cost differential between its heaters and the central heating system and thus failed to establish a *prima facie* case.¹³⁶

Third, the State Board did not refute Moulded's position that its improvement should have been assessed with a single PAR because of its mixed uses (i.e., manufacturing and office space). It maintained, nonetheless, that an assessor's subjective judgment would be required to correct the PAR. The Tax Court recognized that a PAR is "the total linear feet in the perimeter of a building divided by the corresponding square foot area and multiplied by 100 to convert to a whole number."¹³⁷ It also recognized that State Board rules permit an assessor to "compute a PAR for the [mixed use improvement], select the correct square foot price for each [model], and then apply a percentage multiplier based on the actual square footage of each individual section or [model], as compared to the total square footage of the [improvement]."¹³⁸ It then reasoned that the State Board must follow its own rules for assessing real property. The Tax Court commented that State Board determined that Moulded's property constituted a single improvement and thus, it should have assessed a single PAR. The Tax Court further articulated that applying one does not require subjective judgment as suggested by the State Board because the rules offer no other option. It consequently ruled that the State Board acted arbitrarily and capriciously in not following its rules.¹³⁹

Lastly, the Tax Court stated that a taxpayer has the burden of submitting probative evidence in support of its claim for an adjustment of the base price of an improvement.¹⁴⁰ Here, it noted that Moulded offered a four page "Assessment Review and Analysis" supplied by Landmark Appraisals, Inc, but that this document only contained conclusory statements unsupported by explanation. Therefore, the Tax Court ruled that Moulded failed its *prima facie* burden on this issue with regard to its claims for the 1994 tax year.¹⁴¹

134. *Id.* at 721 (citing IND. ADMIN. CODE tit. 50, rr. 2.1-4-7; 2.1-4-3(a); 2.1-4-4; 2.1-4-5 (1992)).

135. *Id.* (citing *Barth, Inc. v. State Bd. of Tax Comm'rs*, 756 N.E.2d 1124, 1128-29 (Ind. Tax. Ct. 2001); *Rinker Boat Co. v. State Bd. of Tax Commr's*, 722 N.E.2d 919, 922 (Ind. Tax. Ct. 1999)).

136. *Id.*

137. *Id.*

138. *Id.* at 722 (quoting IND. ADMIN. CODE tit. 50, r. 2.1-4-1 (1992)).

139. *Id.* at 723.

140. *Id.*

141. *Id.* at 724.

4. *Deer Creek Developers, Ltd. v. Department of Local Government Finance*.¹⁴²—Deer Creek Developers (“Deer Creek”) purchased the Center in 1996.¹⁴³ This facility included a 30,000 square foot, finished supermarket with air-conditioning and 36,286 square foot retail shopping area. After purchasing the Center, Deer Creek added an additional 10,440 square foot, unfinished area without air-conditioning to the supermarket. The Center contained 6,000 square feet of partitioning and the exterior walls were not of uniform height. In March 1994, approximately 43% of the Center was empty.

The Assessor assessed the Center at \$1,645,800 using the General Commercial Mercantile (GCM) Supermarket model for the supermarket portion and the GCM Shopping Center model for the remainder.¹⁴⁴ He also assigned a grade C to the structure. In response, Deer Creek filed a Form 130 Petition for Review of Assessment with the County Board. The County Board increased the assessment to \$1,810,900. Deer Creek filed a Form 131 Petition for Review of Assessment with the State Board and argued that the assessment should have been lowered to \$1,132,900. At this point, the State Board agreed to correct the wall type and exterior wall height, paving, floor area measurement, building components, sprinkler system, and mixed use improvements. Accordingly, it lowered the assessment to \$1,685,400. Deer Creek, nevertheless, appealed seven issues to the Tax Court.¹⁴⁵

First, Deer Creek argued that the Center’s assessment should be reduced by 50% for economic obsolescence because 43% of the Center was continuously empty for the one year period prior to assessment.¹⁴⁶ The State Board responded that such argument was unsupported by any evidence. The Tax Court stated that “[e]conomic obsolescence is a loss of property value because of external factors.”¹⁴⁷ Moreover, it acknowledged that vacancy alone does not prove obsolescence.¹⁴⁸ Rather, the Tax Court accepted vacancy is merely as sign of possible obsolescence and the taxpayer must show why a building is vacant.¹⁴⁹ Consequently, it found that Deer Creek had the burden of presenting probative evidence showing the cause of the Center’s obsolescence. Because it offered no such evidence, the Tax Court ruled that Deer Creek failed its burden and thus did not establish a *prima facie* case.¹⁵⁰

Second, Deer Creek claimed that it has been excessively assessed for partitioning because the GCM Shopping model presumes more partitioning that

142. 769 N.E.2d 259 (Ind. Tax Ct. 2001).

143. *Id.* at 262.

144. *Id.*

145. *Id.*

146. *Id.* at 263.

147. *Id.* (citing IND. ADMIN CODE, tit. 50, rr. 2.1-5-1; 2.1-6-1 (1992)).

148. *Id.* (citing *Louis D. Realty v. State Bd. of Tax Comm’rs*, 743 N.E.2d 379, 387 (Ind. Tax Ct. 2001)).

149. *Id.*

150. *Id.*

is actually present in the Center.¹⁵¹ The State Board countered that the model includes the cost of normal partitioning and thus the Center was appropriately assessed. The Tax Court appreciated that improvements are assessed according to models and that the GCM Shopping model included scant partitioning characteristic of a discount retail finished open area.¹⁵² As a result, it noted that Deer Creek could have established a *prima facie* case by showing that the Center's partitioning is atypical of discount retail finished open area.¹⁵³ Deer Creek submitted evidence that its Center has approximately one square foot of partitioning for each twelve-and-a-half square feet of floor area and claimed that the GCM Shopping model presumes one square foot of partitioning for one square foot of floor area. The Tax Court commented that Deer Creek failed to cite any authority for its 1:1 ratio of partitioning claim. Therefore, the court ruled that Deer Creek did not satisfy its burden.¹⁵⁴

Third, Deer Creek contended that its assessment should have been reduced because the Center's lighting was similar to that used in discount stores as opposed to the expensive lighting used in retail shopping centers. The Tax Court again turned to the GCM Shopping model and pointed out that the model presumes the use of average fluorescent lighting fixtures.¹⁵⁵ Deer Creek offered witness testimony that the lights were "the least expensive fluorescent lights that [he had] ever seen in any commercial store."¹⁵⁶ The Tax Court readily found that these statements were conclusory and not probative, and as such, ruled that Deer Creek failed to establish a *prima facie* case.

Fourth, Deer Creek asserted that the Center should have been assigned a grade D, instead of a grade C, because the materials, design, and workmanship used to construct the structure were inferior to that of Wal-Mart.¹⁵⁷ The Tax Court observed that the grades of A to E are assigned to an improvement's materials, design and workmanship and represent a numeric multiplier that raises or lowers an improvement's base price.¹⁵⁸ Further, the Tax Court commented that a grade of C is given to "moderately attractive buildings constructed with average quality materials and workmanship throughout," while the grade of D is given to "buildings constructed with economy quality materials and fair workmanship throughout."¹⁵⁹ Here, it found that Deer Creek did not submit any probative evidence to explain why a grade C was improper; it again merely offered conclusory witness testimony.¹⁶⁰

151. *Id.*

152. *Id.* at 264 (citing IND. ADMIN. CODE tit. 50, rr. 2.1-4-7; 2.1-4-2(i) (1992)).

153. *Id.*

154. *Id.*

155. *Id.* at 265 (citing IND. ADMIN. CODE tit. 50, rr. 2.1-4-5 (Schedule C); 2.1-4-7 (1992)).

156. *Id.* (quoting Trial Transcript at 25-26).

157. *Id.*

158. *Id.* (citing *Miller Structures, Inc. v. State Bd. of Tax Comm'rs*, 748 N.E.2d 943, 952 (Ind. Tax Ct. 2001)).

159. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 2.1-4-3(f)(1992)).

160. *Id.* at 266.

Fifth, Deer Creek maintained that the Center's walls were excessively assessed because the State Board measured them from base to top at eighteen average feet.¹⁶¹ It argued that the interior walls should have been measured from the floor to the drop ceiling. In addressing the issue of whether the interior or exterior walls should have been used, the Tax Court found that State Board rules indicated that an assessor should determine the adjusted wall height for a building and use this figure to calculate the improvement price when an improvement has two or more sections with varying exterior wall heights.¹⁶² The Tax Court then reflected that the State Board followed this procedure and that Deer Creek cited no authority to show that another method would have been more appropriate. Thus, it ruled that Deer Creek failed again to meet its burden.¹⁶³

Sixth, Deer Creek challenged that the supermarket's 10,440 square foot storage area without air-conditioning should have been assessed using the "unfinished" finish type, instead of with the finished open finish type, and also that the cost for air-conditioning should be subtracted from the base price. The Tax Court noted that "finish type" "denotes the extent to which interior finish is included in the base price" of a model.¹⁶⁴ It then consulted the State Board rules, which required an assessor to locate the finish type that best matches that of the improvement and to use such type in determining the improvement's base price.¹⁶⁵ The Tax Court observed that the State Board rules further required component costs such as air-conditioning to apply to the entire area unless otherwise stated.¹⁶⁶ From this wording, it found that the rule plainly refers to a single area, not adjoining areas, and that an area is not coextensive with its surrounding improvements.¹⁶⁷ Accordingly, the Tax Court determined that the rule implicitly provides for the use of more than one finish type when an improvement has an adjoining area and the finish type of such space differs from that of the improvement.¹⁶⁸ The court found that Deer Creek's evidence sufficiently showed the supermarket was divided into a retail area and a storage area and that the storage area was not air-conditioned. Thus, it rejected the State Board's assessment that the area included adjoining space and found that it acted arbitrarily and capriciously in assessing the storage space.¹⁶⁹

As the final issue, Deer Creek argued that the State Board should have subtracted the cost of wallpaper from the Center's assessment because the GCM Shopping model presumes standard grade wallpaper at a cost of \$0.25 per square

161. *Id.*

162. *Id.* at 267 (citing IND. ADMIN. CODE tit. 50, r. 2.1-4-1(1992)).

163. *Id.*

164. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 2.1-4-3(a) (1992)).

165. *Id.*

166. *Id.* (citing IND. ADMIN. CODE tit. 50, r.2.1-4-3(c) (1992)).

167. *Id.* at 268.

168. *Id.*

169. *Id.*

foot of wall surface, and the Center did not have any wallpaper in its interior.¹⁷⁰ The State Board countered that the absence of wallpaper is not a significant variation from the model necessitating a deduction. The Tax Court held that when an objective feature in a model is absent, the variation is significant.¹⁷¹ Moreover, it reasoned that that State Board has a duty to show that a variation, when present, is not significant. Here, the Tax Court found that the State Board offered no evidence to show that the Center was typical of the model, even without wallpaper.¹⁷²

5. *Griffin v. Department of Local Government Finance*.¹⁷³—Griffin owns property in Lake County where the Hospital Care for the Indigent property tax (“HCIT”) ranged from \$0.4834 to \$0.5024 per one hundred dollars of assessed value.¹⁷⁴ He filed two Form 17T for a refund of this tax for the 1996-1998 tax years with the Lake County auditor. Griffin claimed that (1) the HCIT was an illegal state tax; (2) that it exceed the maximum tax rate allowed under Indiana Code section 6-1.1-18-2; and (3) that it violated the Indiana Constitution because it resulted in nonuniform and unequal taxation of like property. The auditor forwarded Griffin’s refund claims to the State Board. The State Board denied the refund and concluded that it lacked the authority to rule on the constitutionality of the HCIT statute. It also determined that the HCIT was not a state tax and that even if it was, it did not violate that statutory state tax limits because the HCIT statute was enacted after that state tax rate statute and therefore superseded it. Griffin appealed in response to this ruling to the Tax Court.

The Tax Court first considered the history of the tax. The HCIT program was enacted to provide cost-free emergency medical care to indigent patients who did not qualify for Medicaid.¹⁷⁵ The program is funded by a tax levy on property located in each county and by distributions from financial institutions taxes, motor vehicle taxes, and commercial vehicle excise tax. With regard to the property tax component, the legislature provided a formula to mandate the rate.¹⁷⁶ When money is collected for a particular county’s HCIT, it is deposited into that county’s HCIT fund. The county HCI fund is then transferred one time per month into a state fund. Monies from the state fund are used to reimburse emergency medical care providers.¹⁷⁷

170. *Id.*

171. *Id.* at 269.

172. *Id.*

173. 765 N.E.2d 716 (Ind. Tax Ct. 2002) (Griffin I).

174. *Id.* at 717.

175. *Id.* at 719-20.

176. *Id.* at 720 (citing IND. CODE § 12-16-14-3 (2001)). According to the formula, each county is “to impose an HCI tax levy equal to the product of: (1) the HCI property tax levy imposed for taxes first due and payable in the preceding year; multiplied by (2) the statewide average assessed value growth quotient, using all the county assessed value growth quotients determine under Ind. Code § 6-1.1-18.5-2 for the year in which the tax levy will be first due and payable.” IND. CODE § 12-16-14-3 (2001).

177. *Griffin I*, 765 N.E.2d 720.

With this background in place, the Tax Court considered Griffin's argument that the HCIT is an illegal state tax because it is not uniform and equal across counties for like property. Griffin relied on *Lake County Council v. State Board of Tax Commissioners*¹⁷⁸ for support. In that case, the Indiana Tax Court found that the HCIT was a state tax for four key reasons: (1) the State mandates that counties impose the tax at a formulary rate set by statute; (2) the amount of the tax collected in a particular county is not a function of the indigent health care expenses in that county; (3) monies generated by the HCIT are forwarded to the state; and (4) state HCIT monies are used to defray state expenses.¹⁷⁹ To rebut Griffin's position, the State Board contended that the tax was local because the legislature mentioned it under a local tax limit statute. The Tax Court agreed with Griffin that the tax was a state tax in nature and based its rationale on the reasons offered in *Lake County Council*.¹⁸⁰

The Tax Court then disagreed with Griffin's argument that the HCIT exceeded the maximum tax rate allowed under that Indiana Code section 6-1.1-18-2.¹⁸¹ It acknowledged that statutory inconsistencies should be resolved in favor of the more recent statute, as advocated by the State Board. It likewise noted that specific provisions take priority over more general provisions. Hence, the Tax Court ruled that the HCIT statute repeals any inconsistent limitations found within the state tax rate limit statute since it was enacted later in time.¹⁸²

Lastly, although the State Board claimed that the HCIT did not need to be uniform across the state because it is a welfare tax, the Tax Court agreed with Griffin that the HCIT statute violated Article 10, Section 1 of the Indiana Constitution because rates were not uniformly and equally applied.¹⁸³ It noted that the Indiana Constitution requires "(1) uniformity and equality in assessment; (2) uniformity and equality as to rate of taxation; and (3) a just valuation for taxation of all property."¹⁸⁴ The Tax Court found that Griffin established that the HCIT does not achieve a uniform and equal rate, despite its statewide application and use. Specifically, it cited evidence that Griffin paid \$166 HCIT on his assessed property value of \$25,000 in Lake County but that he would have only paid \$0.08 in HCIT in Johnson County for the same property assessment. Accordingly, the Tax Court ruled that the HCIT statute created an arbitrary classification based upon a taxpayer's county of residence, not on differences in property.¹⁸⁵

178. See 706 N.E.2d 270 (Ind. Tax Ct. 2000).

179. *Griffin I*, 765 N.E.2d 721 (citing *Lake County Council v. State Bd. of Tax Comm'rs*, 706 N.E.2d 270, 277 (Ind. Tax Ct. 2000)).

180. *Id.* at 722.

181. *Id.*

182. *Id.*

183. *Id.* at 724.

184. *Id.* at 723 (quoting IND. CONST. Art. X, § 1).

185. *Id.* at 724.

6. *Blackbird Farms Apartment, LP v. Department of Local Government Finance*.¹⁸⁶—Blackbird Farms Apartment, LP (“Blackbird”) owns thirteen acres of land and 154 rental apartments in Tippecanoe County.¹⁸⁷ The State Board promulgated a land order for the 1995 general assessment that permitted the base rate values to vary between \$5,000 and \$240,000 per acre. Assessors valued Blackbird’s land at \$60,000 per acre. Blackbird filed three Form 130 Petitions for Review of Assessment with the County Board. It argued that its land should have been valued between \$30,000 and \$36,000. However, the BOR did not change the valuation. Blackbird then appealed to the State Board, but the State Board also declined to change the assessment.¹⁸⁸ Blackbird appealed in response.

The court ruled that Blackbird must present probative evidence that comparable properties are assessed and taxed differently to challenge the base rate applied under the land order.¹⁸⁹ Blackbird first attempted to meet this burden via evidence of comparable land assessments. Nevertheless, the court did not find evidence that seven “comparable” apartment complexes in Tippecanoe County were assessed at either \$30,000 per acre or \$36,000 per acre to be persuasive. It turned to Indiana Supreme Court precedent and articulated that “whether or not properties are similar enough to be considered ‘comparable’ . . . depends on a number of factors including but not limited to size, shape, topography, accessibility, use.”¹⁹⁰ Further, the court stated that properties within each geographic area, subdivision, or neighborhood in a land order are presumed to be comparable.¹⁹¹ The court then reasoned that none of the properties that Blackbird offered into evidence were in the same township and thus not subject to the same land order. Additionally, it commented that Blackbird failed to explain how the properties were comparable and instead merely made a conclusory statement that the land “is comparable.”¹⁹² Thus, the court did not find such conclusory statements to be probative evidence.

Besides comparable properties, Blackbird also attempted to convince the court through evidence of comparable sales in Tippecanoe County.¹⁹³ It offered a list of six land sales made in tax years 1990-94 with purchase prices ranging from \$11,000 to \$46,000. Nevertheless, the court did not find that these sales were “comparable” because they were made in other townships as before. Likewise, it determined that Blackbird again did not substantiate the costs and thereby failed to establish its *prima facie* case.¹⁹⁴

186. 765 N.E.2d 711 (Ind. Tax Ct. 2002).

187. *Id.* at 712.

188. *Id.* at 713.

189. *Id.* at 714.

190. *Id.* (quoting *Beyer v. State*, 280 N.E.2d 604, 607 (1972)).

191. *Id.* at 712 (citing *State Bd. of Tax Comm’rs v. Indianapolis Racquet Club*, 743 N.E.2d 247, 251-52 (Ind. 2001)).

192. *Id.* at 715.

193. *Id.*

194. *Id.* at 716.

7. *Whetzel v. Department of Local Government Finance*.¹⁹⁵—Whetzel purchased property in Harrison County in September 1995 and received a notice of assessment in September 1997.¹⁹⁶ In March 1998, he received a property tax bill for the 1996 tax year. This bill included a 10% late penalty in the amount of \$110.06. Although Whetzel paid the bill and penalty, he filed a 133 Petition for Correction of Error to dispute the penalty. He argued that he was not given the opportunity to pay the tax bill in a timely manner and that his initial bill included the penalty. The County Board affirmed the penalty. Whetzel appealed this decision to the State Board, who in turn, claimed that it did not have authority to hear or decide the appeal. Whetzel therefore appealed to the Tax Court.

The Tax Court first confirmed that it has subject matter jurisdiction over any case arising under Indiana tax laws and that is an initial appeal of a State Board final determination.¹⁹⁷ Consequently, it explored whether the State Board made a final determination to allow for subject matter jurisdiction over the appeal. It noted that the State Board titled their decision “Final Determination,” yet at the same time deemed that it did not have statutory authority to decide the late penalty issue. The Tax Court reasoned that this qualified as a final determination for their jurisdiction purpose, even though the State Board did not decide a substantive issue. However, given the State Board’s treatment of the case, the Tax Court concluded that it could only decide the limited issue of whether the State Board has the procedural authority to address Whetzel’s penalty.¹⁹⁸

To this end, the Tax Court rationalized that the State Board could decide the penalty issue only if it was permitted to do so by statute. It then reviewed Indiana Code section 6-1.1-30-11(c) which provided that the appeals division of the State Board could review: (1) the assessed valuation of tangible property; (2) property tax deductions; (3) property tax exemptions; or (4) property tax credits.¹⁹⁹ Because the statute did not grant power to review penalties for the late payment of property taxes, the Tax Court thus ruled in favor of the State Board.²⁰⁰

8. *LDI Manufacturing Co., Inc. v. State Board of Tax Commissioners*.²⁰¹—LDI Manufacturing Co., Inc. (“LDI”) owns land in Logansport, Indiana, where it placed two preengineered buildings. The township assessed these buildings as improvements under the General Commercial Industrial (“GCI”) Light Manufacturing model. LDI challenged the application of the GCI pricing schedule to the improvements by filing petitions to both the Cass County Property Tax Assessment Board of Appeals and the State Board. LDI argued that the GCI schedule was inappropriate and that the improvements should have been assessed under the General Commercial Kit (“GCK”) schedule. However, both

195. 761 N.E.2d 9094 (Ind. Tax Ct. 2002).

196. *Id.* at 905.

197. *Id.* at 906.

198. *Id.* at 907.

199. *Id.* at 908.

200. *Id.*

201. 759 N.E.2d 685 (Ind. Tax Ct. 2001).

entities affirmed the original decision to apply the GCI schedule, and LDI appealed to the Tax Court.²⁰²

LDI argued that the State Board abused its discretion and acted arbitrarily and capriciously by failing to apply the GCK schedule. The Tax Court recognized that LDI presented evidence that its improvements were preengineered buildings and that components of the improvements were properly listed and priced under the GCK schedule. In addition, it commented that LDI explained how to calculate its base rate under the GCK schedule.²⁰³ Finally, the Tax Court highlighted that the State Board had, in fact, admitted that LDI's evidence supported the use of the GCK schedule.

In light of this evidence, the Tax Court determined that LDI had presented a proper *prima facie* case that its improvement should have been assessed under the GCK pricing schedule. It therefore determined that the burden shifted to the State Board to rebut LDI's evidence and support its decision with substantial evidence.²⁰⁴

To meet its burden, the State Board argued that LDI's improvements resulted in a "special purpose design building." As proof of this, it particularly relied on LDI's statement that the building could be increased in size. In addition, the State Board accentuated the fact that certain of the building columns were of a thickness twice that of other columns and deemed these "heavy duty columns."²⁰⁵

In its analysis, the Tax Court utilized rules of statutory construction to interpret the term "special purpose design." Under these rules, the Tax Court read the term strictly, giving the words and phrases "their plain and ordinary meaning unless they [were] technical words and phrases having a peculiar and appropriate meaning in the law requiring definition according to their technical import."²⁰⁶ The Tax Court thus defined "special purpose design" as "[a] limited-market property with a unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built[.]"²⁰⁷

Using this definition, the Tax Court decided that LDI's improvements did not constitute a "special purpose design building." It found that the ability to increase the building's size and the column thickness did not mean the building had a unique design, special materials, or restrictive layout that would limit the marketability of the building. Hence, the Tax Court reversed the final determination of the State Board and remanded the case for application of the GCK schedule.²⁰⁸

9. *Thousand Trails, Inc. v. State Board of Tax Commissioners*.²⁰⁹—Thousand Trails, Inc. is a commercial resort in Vermillion County, Indiana, featuring

202. *Id.* at 686-87.

203. *Id.* at 688.

204. *Id.*

205. *Id.* at 689-90.

206. *Id.* at 689.

207. *Id.* (quoting APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 25 (12th ed. 2001)).

208. *Id.* at 690.

209. 757 N.E.2d 1072 (Ind. Tax Ct. 2002).

campgrounds, a lake, and related facilities. In May 1993, the company filed a Form 130 Petition with the County Board to contest its 1992 tax assessment. The County Board then issued a final determination reassessing Thousand Trails' land at \$154,500 and improvements at \$190,100. This determination was, however, for the 1994 tax year, not the 1992 tax year as petitioned. Believing that the decision was for the 1992 tax year, Thousand Trails subsequently filed a Form 131 Petition with the State Board in October 1994 that alleged both subjective and objective errors in the assessments. In December 1995, Thousand Trails also filed Form 133 Petitions for the 1992 and 1993 tax years, alleging objective errors in the assessments and requesting correction.

The State Board issued final determinations on these petitions in January 1997. The State Board assessed the land at \$136,030 and the improvements at \$185,530. It also included a new assessment for a pool and pool apron on Thousand Trails' property that had been omitted from the original assessment. In making this determination, the State Board did not allow the company to present evidence concerning these values at a hearing. Based on these decisions, Thousand Trails appealed to the Tax Court in February 1997.²¹⁰

First, the Tax Court reviewed its subject matter jurisdiction on review of the 130/131 Petitions. Because Thousand Trails failed to submit its petition timely – a fact not disputed by the parties – the Tax Court ruled that the company did not meet the statutory requirements for proper initiation of a tax appeal on this issue.²¹¹ Thus, it barred Thousand Trails from raising objective *and* subjective errors in the tax assessment and summarily dismissed the company's appeal of the 130/131 Petition for lack of subject matter jurisdiction.²¹²

Second, regarding the 133 Petitions, Thousand Trails argued that the information included in its Form 131 Petition was sufficient to allow the State Board to "conclusively know" that the company was entitled to reassessment and adjustments. The company sought changes on the issues of land classification, kit building adjustment on a maintenance building, and the application of a different depreciation schedule for an office building. The Tax Court, however, stated that each property tax appeals process stands alone and that the information in Thousand Trails' appeal of its 130/131 Petition could not be used to support its 133 Petitions.²¹³ As a result, it deemed that Thousand Trails did not present any evidence to substantiate the objective errors alleged in the assessments, and the Tax Court refused relief on these petitions.

Finally, Thousand Trails argued that it was denied the opportunity to rebut the State Board's assessment of its pool and pool apron value. Thousand Trails requested another hearing before the State Board to challenge those assessments. Here, too, the Tax Court disagreed, stating that the company had sixteen months following the State Board's final determination to gather evidence and present it at trial to the Tax Court. Since Thousand Trails did not do so, the Tax Court

210. *Id.* at 1074-75.

211. *Id.* at 1076.

212. *Id.*

213. *Id.*

denied the company's request for a new hearing before the State Board.

10. *Barth, Inc. v. State Board of Tax Commissioners*.²¹⁴—In December 1991, Barth, Inc., filed six Form 133 Petitions with the Kosciusko County Auditor to correct alleged errors in assessments on its commercial buildings in Milford, Indiana.²¹⁵ These assessments were for the 1989-91 tax years and involved a light manufacturing building, small shop, and light utility storage building. Local officials denied Barth's petitions in January 1992 and forwarded them to the State Board for final determination. In November 1996, the State Board denied Barth's petitions without reviewing the merits because it believed that a remedy would necessarily involve subjective judgment and that 133 Petitions were consequently improper. Barth appealed to the Tax Court, which decided that 133 Petitions could be used to correct objective errors and remanded the case to the State Board to determine whether the assessments were erroneous. In April 1999, the State Board issued a final determination stating that Barth had failed to present a *prima facie* case of error and again denied relief. Barth appealed a second time to the Tax Court in May 1999.

The Tax Court held that a taxpayer must present a *prima facie* case supported by probative evidence taxpayer must present a *prima facie* case supported by probative evidence when challenging a final determination from the State Board. It explained that probative evidence is evidence that is sufficient to establish a given fact and which if not contradicted will remain sufficient.²¹⁶ The Tax Court then noted that the burden shifts to the State Board to rebut the evidence and justify its decision with substantial evidence once the taxpayer presents a proper *prima facie* case.²¹⁷

In the instant case, Barth presented six alleged occurrences of miscalculation involving its three buildings: 1) improper classification of a building heater; 2) lack of windows in one building; 3) materials used in exterior walls; 4) partitioning; 5) difference in floor finish; and 6) difference in wall height. In each of these alleged errors, however, the Tax Court found that Barth failed to present sufficient evidence to establish a *prima facie* case. It either deemed the evidence inadequate or the error as a subjective judgment not properly evaluated under a Form 133 Petition. As a result, the Tax Court found that the State Board had not acted arbitrarily or capriciously in denying Barth's petitions.²¹⁸

11. *Boehning v. State Board of Tax Commissioners*.²¹⁹—Richard Boehning, Phyllis Boehning, and Louise Heinold (collectively, "the Taxpayers"), along with Harvey Gutwein, own a stone quarry in Pulaski County, Indiana.²²⁰ The

214. 756 N.E.2d 1124 (Ind. Tax Ct. 2001).

215. *Id.* at 1127.

216. *Id.* (quoting *Damon Corp. v. State Bd. of Tax Comm'rs*, 738 N.E.2d 1102, 1106 (Ind. Tax Ct. 2000)).

217. *Id.* (quoting *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1233 (Ind. Tax Ct. 1998)).

218. *Id.* at 1129-32.

219. 763 N.E.2d 502 (Ind. Tax Ct. 2001).

220. *Id.* at 503.

Taxpayers are assessed for eighty acres, and Gutwein is separately assessed for another seventy-eight acres. For the March 1995 assessment, Pulaski County officials classified the property as seventy-six acres primary commercial/industrial land, 3.32 acres undeveloped usable commercial/industrial land, and 0.68 acres roadway. The Taxpayers challenged this assessment, arguing that only one acre was primary commercial/industrial and that the remainder were undeveloped usable commercial/industrial land. Concurrently, Gutwein also challenged classification of his land. The County Board, however, declined reclassification. Both parties petitioned to the State Board.²²¹

The State Board held a joint hearing for both the Taxpayers and Gutwein, but subsequently issued a final determination only in the Taxpayers' case. This decision upheld the lower County Board's assessment. Both parties then appealed to the Tax Court in May 1999. Prior to trial, however, Gutwein and the Pulaski County officials reached a settlement and removed his case from the Tax Court's docket.²²²

On appeal, the Taxpayers asserted that Gutwein's settlement served as legal precedent and should control the outcome of their case. The Tax Court disagreed, stating that to enter settlement negotiations as precedent at trial would deter parties from settling and this would contradict Indiana Evidence Rule 408, which promotes settlements by allowing parties to avoid judgment or admission of liability or wrong-doing.²²³ Moreover, the Tax Court expressed concern that such action might have a chilling effect on the incentive of government officials to settle cases. It thus refused to consider the Gutwein settlement in its decision.

Focusing on the substance of the Taxpayers' appeal, the Tax Court noted that the Taxpayers produced detailed testimony regarding the specific use of their land at trial. It commented that this testimony was particularly directed to the definitions of "primary commercial or industrial land" versus "unusable undeveloped commercial and industrial land." The Tax Court likewise appreciated that the Taxpayers testified in detail about how parcels of land were used, what equipment was used on it, and where machinery or materials were stored. Based on this testimony, the Tax Court concluded that the Taxpayers had indeed produced sufficient evidence to support a *prima facie* case showing its land was improperly classified. Furthermore, it recognized that the State Board did not properly rebut this evidence, but instead merely rejected the case based on a lack of written documentation. The Tax Court consequently reversed and remanded the case to the State Board to reclassify the land.²²⁴

12. *Talesnick v. State Board of Tax Commissioners*.²²⁵—Talesnick was a resident of Eagle Ridge subdivision, which bordered the Eagle Creek Reservoir. Talesnick's property, consisting of 2.717 acres, included a water flowage easement encumbering a portion of the land. Following a Land Order issued by

221. *Id.*

222. *Id.* at 503-04.

223. *Id.* at 504.

224. *Id.* at 507.

225. 756 N.E.2d 1104 (Ind. Tax Ct. 2001).

the Marion County Land Valuation Commission and the State Board, the Township Assessor valued Talesnick's property at the highest values under the land order: the land at \$116,910 and the improvements at \$194,100.²²⁶ The County Board upheld this assessment, and Talesnick filed a 131 Petition with the State Board. There, Talesnick asserted that the base rate for his property should be reduced and that a negative influence factor should have applied to his land because of the water flowage easement. The State Board denied Talesnick's petition. In response, he appealed to the Tax Court.²²⁷

In March 1998, the Tax Court remanded the case to the State Board because it found that Talesnick successfully established a *prima facie* case that his land had been valued incorrectly. The Tax Court also remanded the case to the State Board for a determination on whether the easement encroached Talesnick's land enough to merit a negative influence factor.²²⁸

In July 1998, the State Board held its remand hearing on this case. It reduced the valuation of Talesnick's first acre from \$110,000 to \$90,000. It did not reduce the value of further acreage from the maximum rate of \$4,000 per acre because it narrowly construed the Tax Court's remand order to the sole issue of the value of the first acre. The State Board also denied Talesnick's request for the application of a negative influence factor for the water flowage easement because it decided that the easement was not unlike easements on other nearby properties. Talesnick filed another appeal to the Tax Court to challenge these decisions.²²⁹

Concerning the valuation of the acreage in excess of the first acre, Talesnick asserted that lack of both a sewer and city water and limited accessibility to the property reduced the value of the property. The State Board countered by stressing that the Tax Court's order applied only with respect to the first acre. In addition, the State Board argued that the factors that Talesnick cited should not impact the other acres because no home was constructed on them. The Tax Court cited its prior decision and explained that its reasoning applied to the entirety of Talesnick's property, despite mention of the first acre alone. It therefore remanded the issue to the State Board for revaluation.²³⁰

Regarding the application of a negative influence factor, the Tax Court decided that Talesnick presented a *prima facie* showing based on evidence presented at the remand hearing. It commented that Talesnick offered testimony and maps supporting the higher relative encumbrance of the water flowage easement compared to nearby residential properties. The Tax Court, as a result, remanded this issue to the State Board in light of the intervening case *Phelps Dodge v. State Board of Tax Commissioners*,²³¹ which explains how to quantify influence factors to reflect the actual deviation of property from average market

226. *Id.* at 1105-06.

227. *Id.* at 1106.

228. *Id.*

229. *Id.* at 1106-07.

230. *Id.* at 1107.

231. 705 N.E.2d 1099 (Ind. Tax Court 1999).

value.

13. *Aboite Corp. v. State Board of Tax Commissioner*.²³²—Aboite Corporation (“Aboite”) owns land and a shopping center in Allen County, Indiana.²³³ In March 1992, Aboite’s property was assessed at \$2,317,300. Aboite, believing this value was in error, filed an appeal with the County Board. In November 1992, the County Board affirmed the initial assessment, and Aboite filed a 131 Petition with the State Board. The State Board conducted a hearing and subsequently issued a final determination in January 1997. It reduced the assessed value of Aboite’s property to \$1,895,440, but denied Aboite relief on the issues of additional obsolescence depreciation, land reclassification, and atrium pricing. Aboite appealed those three issues to the Tax Court in January 1997.²³⁴ The issue of obsolescence depreciation, however, was remanded to the State Board prior to trial and not addressed in the opinion.

Regarding the issue of land reclassification, Aboite and the State Board disagreed on whether the State Board had the authority to reassess property. The controlling statute, Indiana Code section 6-1.1-4-12, requires reassessment of land 1) if acreage is subdivided into lots, or 2) if the land is put to a different use.²³⁵

Aboite argued that it qualified for an exception to these conditions in the statute. This exception prevents reassessment upon subdivision until the next assessment date following a transaction that results in a change in title to the lot.²³⁶ The Tax Court noted, however, that the intent of this statutory exception was to protect the owner who subdivides a lot and sells some of the subdivided sections from being assessed a higher tax value. It recognized here, however, that Aboite did not sell its property, but instead changed the use. Thus, the Tax Court determined that Aboite did not qualify for the exception to reassessment merely because it retained some of its subdivided lots. The Tax Court affirmed the State Board’s final determination denying Aboite relief on this issue.

Aboite next contested the State Board’s assignment of value to its shopping center atrium as being arbitrary and capricious. The State Board assessed the value of Aboite’s atrium under an “A quality” pricing scheme. Aboite argued that the State Board failed to provide sufficient instructions on how to properly assess an atrium, and that its atrium should have been priced under a “C quality” scheme. The Tax Court disagreed, characterizing Aboite’s arguments as mere conclusory statements with little probative evidence. It suggested that Aboite could have, for example, offered evidence that other similar atriums were priced differently. Hence, the Tax Court commented that Aboite failed its burden of proof and affirmed the State Board’s final determination denying relief to Aboite on the atrium pricing issue.²³⁷

232. 762 N.E.2d 254 (Ind. Tax Ct. 2001).

233. *Id.* at 256.

234. *Id.*

235. *Id.* at 257.

236. *Id.* at 257-58 (citing IND. CODE § 6-1.1-4-12 (2001)).

237. *Id.* at 258-59.

14. *Huntington County Community School Corp. v. State Board of Tax Commissioners*.²³⁸—In 1999, the Huntington County Community School Corporation (“School Corporation”) instituted a plan for the reconstruction of several school buildings. In March 2000, the School Corporation held a public hearing to consider this construction process. Soon after, taxpayers filed 504 petitions with the Huntington County Auditor to oppose the construction. However, the petitions were not verified as required by law.²³⁹ Two months later, the School Corporation reviewed the petitions and discovered this flaw. Because the petitions were improperly executed, the School Corporation decided that they were insufficient to begin the petition and remonstrance process cited in Indiana Code section 6-1.1-20-3.2.²⁴⁰

The School Corporation proceeded with its plans and in January 2001, it approved a lease rental agreement. When notice of this decision was published in February 2001, taxpayers again filed another remonstrance petition. The School Corporation immediately petitioned the State Board to approve the lease. The State Board, in turn, referred the petition to the Indiana School Property Tax Control Board (“Control Board”).²⁴¹ The School Board held a public hearing in March 2001, where concerned taxpayers had the opportunity to object to the lease on the basis that it was neither fair nor reasonable; following the discussion, the School Board decided to go forward with the lease. Subsequently, the Control Board held a hearing in April 2001, where arguments for and against the lease were again voiced. After the hearing, the Control Board recommended approving the lease.²⁴²

The State Board considered the recommendation of the Control Board, and issued its final determination on June 1, 2001. It approved the execution of the lease, but “subject to the condition that [the School Board] . . . first be required to obtain approval of the project through the petition and remonstrance procedures found in [Indiana Code section] 6-1.1-20-3.2.”²⁴³ The State Board was primarily concerned that the Auditor had provided taxpayers the incorrect or incomplete forms for the remonstrance petition, then later used these deficiencies as cause for invalidating the submitted petition. As a result of this conditional approval, the School Board appealed to the Tax Court.

The State Board argued that the authenticity of the signatures on the petition were not in dispute, and the number of signatures was more than double that required by law. Nevertheless, the Tax Court construed the requirements in the Indiana Code strictly to require the verification provisions. Despite the flaws in the forms provided by the Auditor, the Tax Court firmly imposed the unambiguous statutory requirement that the petition be verified. “While the taxpayers had a right to challenge the School Corporation’s proposed lease

238. 757 N.E.2d 235 (Ind. Tax Ct. 2002).

239. *Id.* at 236 (citing IND. CODE § 6-1.1-20-3.1(5)(2001)).

240. *Id.* at 237.

241. *Id.*

242. *Id.*

243. *Id.* at 237-38.

agreement . . . they also bore the responsibilities that were attached to that right.”²⁴⁴ It attached the fault directly to the taxpayers despite any flawed forms. It likewise noted that taxpayers had several opportunities to remonstrate, and thus reversed the final determination of the State Board.²⁴⁵

B. Tangible Personal Property Tax

1. *Standard Plastic Corp. v. Department of Local Government Finance*.²⁴⁶—Standard Plastic (“Standard”) manufactures plastic molded parts in Wells County, Indiana.²⁴⁷ It possessed, but did not own, 20 to 50 year old special tools. Standard’s customers actually owned these tools, and permitted the company to use them to make difference types of plastic injected-molded products. When Standard filed its 1995 Business Tangible Personal Property Assessment Return (Form 103), it did not report the value of any of the special tools. Likewise, it did not file a Confidential Return of Special Tools (Form 103-T) to disclose that it even possessed any customer-owned special tool molds.²⁴⁸

During an audit of Standard’s Form 103, the State Board field auditor found that Standard failed to report the special tool molds. Standard responded by providing a list of replacement costs for the molds amounting to \$2,725,703. The auditor requested, however, a list of estimated original costs instead. Standard thus provided a second list showing estimated original costs totaling \$355,950. Despite this request, the auditor and her supervisor ultimately rejected the estimated original cost list and opted to assess the special tools on the basis of the replacement cost list. Consequently, the auditor increased Standard’s total assessed value from \$99,590 to \$139,180 and also recommended a 20% penalty with respect to the \$39,590 increase in value.²⁴⁹

Standard objected to the auditor’s assessment and sought an administrative hearing before the State Board. It argued that (1) the special tool molds should have been assessed according to the estimated cost; (2) its barrel and screw assemblies and platens should have been assessed as special tools and therefore entitled to a deduction; and (3) it should have received a deduction for application software because the value of such software was sufficiently reflected on its books and records.²⁵⁰ The Board disagreed with Standard on all three issues. In turn, Standard filed an appeal with the Tax Court.

Standard first stipulated that the Board’s refusal to use Standard’s list of estimated original costs was arbitrary and capricious, even though the Board found that the second list was not credible evidence. The Tax Court acknowledged that the Indiana personal property tax system is based upon self-

244. *Id.* at 241.

245. *Id.*

246. 773 N.E.2d 379 (Ind. Tax Ct. 2001).

247. *Id.* at 381.

248. *Id.*

249. *Id.* at 382.

250. *Id.*

assessment, full disclosure, and accurate reporting.²⁵¹ It then turned to consider the State Board's own regulation pertaining to special tools. The regulation stated, "The total value of special tools not owned by the taxpayer must be based on the original cost to the owner of such special tools, if available. If the original cost to the owner is not available, the value shall be based upon the best information available."²⁵² The Tax Court determined that this regulation was clear—if original cost is not available, then the best information with regard to the original cost must be used.²⁵³ It therefore reasoned that Standard provided the State Board with the best information available when it assembled the list of estimated original costs given that it could not know the actual original cost to the owners. Moreover, the Tax Court recognized that the regulation did not make any reference to using replacement costs and that the Board acted contrary to this regulation in using the replacement costs for assessment purposes.²⁵⁴ Thus, the Tax Court ruled that the State Board's final determination was not supported by substantial evidence and was arbitrary and capricious.²⁵⁵

Next, Standard claimed that its barrel and screw assemblies and platens are special tools in accordance with Indiana Administrative Code section 4.2-6-2(b). Under this regulation, "'special tools' includes, but [are] not limited to, tools, dies, jigs, fixtures, gauges, molds, and patterns acquired or made for the production of products or product models which are of such specialized nature that their utility generally ceases with the modification or discontinuance of such products or product models."²⁵⁶ As evidence to support their position, Standard offered a list of barrel and screw assemblies from Newcastle Industries with a description of possible applications for each assembly. Additionally, Standard presented a copy of a fax sent to Cincinnati Milacron as proof that Cincinnati Milacron considered Standard's assemblies and platens to be special tools. The Tax Court found this evidence, however, to be merely conclusory and upheld the State Board's determination. Indeed, it pointed out that the fax did not even contain a definitive statement or opinion that the assemblies and platens were of such a specialized nature that their utility generally ceases with the modification or discontinuance of various molds as required by the regulation.²⁵⁷

Finally, Standard argued that it should not have been assessed for the application software used in its injection molding machines, but instead entitled to a deduction because this software was included on its books and records.²⁵⁸ To address this issue, the Tax Court again turned to the Board's regulations. "If the value recorded on the books and records reflects charges for customer support services such as . . . application software that relate to future periods and not to

251. *Id.* at 195.

252. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 4.2-6-2(d)(2) (1996)).

253. *Id.* at 384.

254. *Id.*

255. *Id.* at 385.

256. *Id.* (citing IND. ADMIN. CODE tit. 50, r. 4.2-6-2(b)(1996)).

257. *Id.* at 386.

258. *Id.*

the value of the tangible personal property, such charges may be deducted as nonassessable intangible personal property.”²⁵⁹ Standard maintained that the value of the application software was recorded on its books and records “in the form of” its property tax return and on invoices submitted to the State Board. The Tax Court pointed out, nevertheless, that the face of neither the tax return nor the invoices showed such value.²⁶⁰ Furthermore, it reasoned that the fax offered by Standard also failed as evidence because it did not record any value but merely discussed the software components on the Cincinnati Milacron injection molding machines.²⁶¹ Hence, the Tax Court once more affirmed the State Board’s final determination.

With respect to the penalty assessed because Standard failed to include the special tools on its Form 103, the Tax Court found that Standard undervalued its personal property.²⁶² It noted that the regulations provide for a penalty of 20% of the additional taxes due as a result of undervaluation.²⁶³ The Tax Court, accordingly, remanded the penalty issue to the Board pending proper valuation of the special tools in line with estimate original costs.²⁶⁴

2. *Edgcomb Metals Co. v. Department of Local Government Finance*.²⁶⁵—Edgcomb Metals Company (“Edgcomb”), a Delaware corporation, owns and operates a steel service center in Indianapolis, Indiana.²⁶⁶ The company purchased large sheets of steel from mills both inside and outside of the state and resold them to customers inside and outside of the state. The mills wrapped the sheet metal on coils before shipping to Edgcomb to facilitate transport. Edgcomb then stored the steel in its Indianapolis warehouse until a customer purchased the steel. Its inventory consisted of three forms of steel: (1) “as is” steel; (2) “custom cut” steel; and (3) “standard cut.”

Edgcomb claimed an exemption on its 1995, 1996, and 1997 personal property tax for the “standard cut” steel under Indiana Code section 6-1.1-10-29.3 because it deemed that the steel had been repackaged in preparation for out-of-state shipment. This code section provides that personal property shipped into Indiana qualifies for a property tax exemption if the property is stored in an in-state warehouse for transshipment to an out-of-state destination and is ready for transshipment without additional manufacturing or processing, except repackaging. A hearing officer for the State Board found that the “standard cut” steel had not been repackaged, but instead was further processed to form a saleable good. Therefore, the officer concluded the “standard cut” steel did not qualify for the exemption for any year. The State Board affirmed the officer’s determination, and Edgcomb appealed the decision to the Tax Court.

259. *Id.* at 386-87 (quoting IND. ADMIN. CODE tit. 50, r. 4.2-4-3(g)(1996)).

260. *Id.* at 387.

261. *Id.*

262. *Id.* at 388.

263. *Id.* at 387 (citing IND. CODE § 6-1.1-37-7(e) (2000)).

264. *Id.* at 388.

265. 762 N.E.2d 259 (Ind. Tax Ct. 2002).

266. *Id.* at 261.

To resolve whether the “standard cut” steel was repackaged for purposes of the exemption, the Tax Court read Indiana Code section 6-1.1-10-29.3 together with other interstate commerce exceptions, namely Indiana Code sections 6-1.1-10-29(b)(1) and 6-1.1-10-30(a), (b), and (c). The Tax Court reasoned that Indiana Code section 6-1.1-10-29.3 operates to provide an alternative exemption for taxpayers who are unable to qualify for the “original package” exceptions of Indiana Code sections 6-1.1-10-29(b)(1) and 6-1.1-10-30(a), (b), and (c). Under the latter sections, personal property is exempt from taxation if it remains in its original package without further processing.²⁶⁷ In light of the emphasis on “original packaging,” the Tax Court stressed that the “repackaging” language of Indiana Code section 6-1.1-10-29.3 means transferring to a different container for the purposes of shipment, not to packing in the sense of combining different parts. In addition, it pointed to *Monarch Steel Co. v. State Board of Tax Commissioners*²⁶⁸ wherein the Tax Court said that “securing an interstate commerce exemption most often hinges on the distinction between ‘manufacturing or processing’ on the one hand and ‘packaging’ or ‘repackaging’ on the other.”²⁶⁹

To support its “repackaging” exemption position, Edgcomb described its procedures for handling the sheet steel upon arrival from the mills to prepare the “standard cut” inventory.²⁷⁰ It stated that it first uncoiled the steel from its original packaging. It then leveled the steel and cut it into manageable, standard sheets for ease of storage and shipment. The State Board asserted, however, that leveling altered the steel’s form and that “standard cut” steel is in itself a final product.²⁷¹ The Tax Court disagreed with the State Board and reasoned that leveling and cutting the steel actually just repackages large quantities into smaller quantities. Likewise, it determined that the sheet steel itself was the final product, not the “standard cut.” It found that customers were better able to use pieces of “standard cut.” Therefore, the Tax Court ruled that Edgcomb’s “standard cut” pieces are exempt from taxation under Indiana Code section 6-1.1-10-29.3.²⁷²

3. *Ispat Inland, Inc. v. State Board of Tax Commissioners*.²⁷³—Ispat Inland, Inc. (“Ispat”) owns a steel mill in Lake County, Indiana, purchased in 1998 from Inland Steel Company. In November 2000, the County Board employed Tax Management Associates, Inc. (“TMA”), a North Carolina accounting firm, to conduct an audit of Ispat’s personal property tax returns for that year.²⁷⁴

Counsel for Ispat contacted the Lake County Assessor (“Assessor”), expressing reservation about TMA’s authority to conduct the audit. Although the

267. *Id.* at 263.

268. 611 N.E.2d 708 (Ind. Tax. Ct. 1993).

269. *Edgcomb*, 762 N.E.2d at 264.

270. *Id.*

271. *Id.* at 265.

272. *Id.*

273. 757 N.E.2d 1078 (Ind. Tax Ct. 2001).

274. *Id.* at 1081.

Assessor admitted that third parties were not referred to in the confidentiality statutes, he assured Ispat that all confidential information would be handled appropriately. The Assessor then validated his position with a senior administrative law judge with the State Board, who confirmed that the Assessor was properly within his authority to contract with and disclose confidential information to TMA.²⁷⁵ The Assessor thus insisted that Ispat schedule an audit with TMA, and Ispat petitioned the State Board to interpret the property tax laws. Additionally, Ispat requested the State Board instruct the Assessor that: (1) the Assessor could not audit Ispat because the statute of limitations to change the assessment had expired; (2) the confidentiality statute precluded disclosure of Ispat's confidential information to TMA; and (3) the Assessor was not permitted to delegate his official duties regarding business personal property taxes to a third party.²⁷⁶ The State Board determined that the Assessor could employ a third party because local officials "lack sufficient expertise . . . to perform some auditing and similar tasks pertaining to personal property assessment."²⁷⁷ Ispat subsequently appealed to the Tax Court.

The State Board moved for dismissal of the appeal for lack of subject matter jurisdiction because there was not a final determination at the State Board level. The State Board presented three arguments supporting this assertion. First, the phrase "final determination" was not present in the decision. Next, the State Board had exercised its authority to interpret tax laws, which was independent from statutes governing issuance of final determinations. Third, the State Board had issued only an advisory opinion to Ispat.²⁷⁸

Considering the jurisdictional requirements, the Tax Court stated that it held "exclusive jurisdiction over any case that arises under the tax laws of [Indiana] and that is an initial appeal of a final determination made by the State Board."²⁷⁹ It first noted that both parties agreed that the case arose under Indiana tax laws. Additionally, the Tax Court decided that the State Board's decision was a final determination. It held that the State Board's reliance on *Lake County Council v. State Board of Tax Commissioners*²⁸⁰ was flawed. The Tax Court distinguished the facts in *Lake County Council* from the instant facts. It acknowledged that here, unlike in *Lake County Council*, Ispat received a decision, which "determined rights and imposed obligations on the parties," signed by all three State Board commissioners.²⁸¹ On these two grounds, the Tax Court ruled that it possessed subject matter jurisdiction over the case.

The Tax Court then analyzed the merits of Ispat's request for injunctive relief against the Assessor, since both parties agreed that the issues had been fully litigated before the court. It first decided the threshold issue of whether the

275. *Id.*

276. *Id.* at 1081-82.

277. *Id.* at 1082.

278. *Id.* at 1082-83.

279. *Id.* at 1083 (quoting IND. CODE § 33-3-5-2 (2001)).

280. 706 N.E.2d 270 (Ind. Tax Ct. 1999).

281. *Ispat*, 757 N.E.2d at 1084.

Assessor's delegation of his duties was lawful. The Tax Court disagreed with the State Board and the Assessor, stating that there was no statutory basis for delegation of auditing duties to third parties. While it acknowledged that the legislature granted counties authority to employ third parties in matters involving real property, it held that the statute intended to impliedly exclude those not specifically enumerated like auditing.²⁸² Thus, it ruled that the Assessor's delegation of auditing duties for personal property to TMA was an unlawful act. The Tax Court dismissed the State Board's motion to dismiss and enjoined the Assessor from delegating personal property assessment duties to TMA.

4. *Cooke Chevrolet Co. v. State Board of Tax Commissioners*.²⁸³—Cooke Chevrolet Company ("Cooke") is a car dealership located in Vanderburgh County, Indiana. In August 1991, the Township Assessor valued Cooke's commercial land at \$29,970 and improvements at \$84,730. In October 1991, the Vanderburgh County Assessor filed a 130 Petition with the County Board alleging that the township's assessment was too high. As a direct result, the County Board reduced the assessment of the land to \$17,970 and the improvements to \$72,070. The Township Assessor filed a 131 Petition with the State Board in November 1991, asserting that the Vanderburgh County Assessor was not authorized to file the petition on behalf of Cooke.²⁸⁴

In its final determination, the State Board decided that only Cooke – and not the county assessor – was permitted to file a 130 Petition. Therefore, it reasoned that the County Assessor's 130 petition was not properly before the County Board and any subsequent action by the County Board (i.e., reducing the assessed values) was void. The State Board found no reason to consider the merits of the 131 Petition filed by the Township Assessor and reinstated the initial assessment rendered by the Township Assessor. Cooke filed an appeal to the Tax Court in January 1997.²⁸⁵

On appeal, the State Board argued that only taxpayers are permitted to file 130 Petitions, and that one filed by the County Board was void as a result. It thus stipulated that it was improper to consider the merits of the Township Assessor's 131 Petition. The Tax Court decided otherwise, agreeing instead with Cooke's argument. The Tax Court, citing favorably to Indiana Code section 6-1.1-13-5 and *Wetzel Enterprises, Inc. v. State Board of Tax Commissioners*,²⁸⁶ held that "the County Assessor could bring Cooke's assessment to the attention of the [State Board] by filing a 130 Petition"²⁸⁷ It therefore decided that the County Board's reassessment was not void, and the State Board should have considered the Township Assessor's 131 Petition. The Tax Court then determined that the State Board acted arbitrarily and capriciously, reversed the

282. *Id.* at 1085 (citing IND. CODE § 6-1.1-4-16, 17, 18 (2002)).

283. 756 N.E.2d 1121 (Ind. Tax Ct. 2001).

284. *Id.*

285. *Id.* at 1123.

286. 694 N.E.2d 1259 (Ind. Tax Ct. 1998).

287. *Cooke Chevrolet*, 756 N.E.2d at 1124.

State Board's final determination, and remanded the case to the State Board.²⁸⁸

5. *Inland Container Corp. v. State Board of Tax Commissioners*.²⁸⁹—Inland Container Corporation ("Inland") operates a mill in Vermillion County, Indiana, that disposes of waste materials and converts them into recycled paper.²⁹⁰ In March 1994, Inland requested that the Indiana Department of Environmental Management certify its mill as a resource recovery system ("RRS"), which it did in April 1994. In June 1994, Inland filed a claim for deduction due to status as an RRS (RRS-1 form) as permitted under Indiana Code section 6-1.1-12.28.5. The county assessor approved the form, and the auditor sent a tax statement to Inland that included the RRS deduction. Inland paid the corresponding taxes on May 10, 1995.²⁹¹

Shortly thereafter, the Indiana legislature amended the statutes containing the RRS provision with an emergency effective date of May 1, 1995. The amendment permitted the RRS deduction only for those systems certified for the 1993 assessment year or earlier. It also provided for a phase out period ending in 1997. This amendment further stated that any RRS assessed and first deducted in the 1994 assessment year could not receive the deduction.²⁹²

In October 1995, the Vermillion County Treasurer notified Inland that it no longer qualified for the RRS deduction. Inland filed a Form 133 Petition and Form 130 Petition with the County Board. Inland challenged the valuation of its land, but the County Board denied Inland's petitions. Inland then filed a Form 131 Petition for Review to the State Board in January 1996 challenging the County Board's denial of the RRS deduction. Inland was again denied relief. Inland filed an appeal to the Tax Court in September 1996.²⁹³

The State Board characterized the amended RRS provision as a legislative policy decision and as such, stipulated that it was not properly reviewable by the Tax Court. The Tax Court disagreed with the State Board, stating "Article 10, [Section] 1 does not provide immunity to legislative policy judgments from judicial oversight, 'but rather establishes mandatory minimum requirements for our system of property assessment and taxation.'"²⁹⁴ Additionally, the Tax Court disagreed with the State Board's position that the deduction was not part of the assessment. Instead, it viewed the deduction as a "stage in arriving at the assessed value that is the basis for taxation."²⁹⁵ Consequently, the Tax Court determined that it could properly review the statute's constitutionality.

To support his appeal, Inland argued that the amended Indiana statute phasing out the RRS deduction was unconstitutional as a violation of Article 10, Section 1 of the Indiana Constitution since only those taxpayers who had a RRS

288. *Id.*

289. 756 N.E.2d 1109 (Ind. Tax Ct. 2001).

290. *Id.* at 1112.

291. *Id.*

292. *Id.* at 1112-13 (citing IND. CODE § 6-1.1-12-28.5(2000)).

293. *Id.* at 1113.

294. *Id.* at 1117 (quoting *Boehm v. Town of St. John*, 675 N.E.2d 318, 324 (Ind. 1996)).

295. *Id.*

deduction certified in 1993 or earlier were eligible to participate in the phase-out schedule. In particular, he contended that the amended RRS statute created non-uniform and unequal taxation.²⁹⁶ Inland presented exhibits to show other similar properties that had been granted the RRS deduction. As well, he argued that the legislature created a classification based on the date that the RRS deduction was certified, a difference that "was arbitrary because it was not based on differences 'naturally inhering' within the RRS property itself."²⁹⁷ The Tax Court completely agreed with Inland. It thus ruled that the statute was unconstitutional because it created artificial distinctions between similarly situated properties.

Regarding remedy, Inland sought to have the RRS statute apply without the phase-out date provisions. The State Board, on the other hand, argued that the only remedy available was to void the entire statute; thus, Inland and all other taxpayers claiming the RRS deduction would receive no such deduction. The Tax Court again found in Inland's favor. It granted him relief from "any unlawful tax that would result from an unconstitutional restriction of the RRS deduction" and authorized him to participate in the phase-out schedule.²⁹⁸

C. Sales and Use Tax

1. *Rhoades v. Indiana Department of State Revenue*.²⁹⁹—Rhoades, an Indiana resident, purchased a motor vehicle for \$17,265.50 in Florida on January 31, 1998.³⁰⁰ He also paid a 6% Florida sales tax on this purchase. After returning home, Rhoades titled his vehicle in Indiana on April 20, 1998 and was assessed a 5% Indiana use tax in the amount of \$878.27 on the purchase price. On October 22, 1998, Rhoades filed a claim for a refund of the use tax along with statutory interest with the Indiana Department of State Revenue ("Department").³⁰¹ The Department denied his claim on December 29, 1998. Rhoades appealed to the Tax Court on February 1, 1999 and later filed a motion for summary judgment. The Department, in turn, filed a motion for judgment on the pleadings.³⁰²

Rhoades argued that he was free from paying Indiana's use tax on his vehicle because he already paid Florida's sales tax at the time of purchase.³⁰³ In support of his position, he relied on Indiana Code section 6-2.5-3-6(d), which states that "a person liable for this use tax imposed in respect to a vehicle . . . shall pay the tax . . . unless the person presents proof . . . that the use tax or state gross retail

296. *Id.* at 1116.

297. *Id.* at 1119 (citing *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1042 (Ind. 1998); *State Bd. of Tax Comm'rs v. Lyon & Greenleaf Co., Inc.*, 359 N.E.2d 931 (1997)).

298. *Id.* at 1121.

299. 774 N.E.2d 1044 (Ind. Tax Ct. 2001).

300. *Id.* at 1046.

301. *Id.*

302. *Id.*

303. *Id.* at 1047.

tax has already been paid with respect to the purchase of the vehicle.”³⁰⁴ In contrast, the Department contended that the legislature intended to impose a use tax on vehicles that are purchased in other states and required to be titled in Indiana. Specifically, the Department cited Indiana Code section 6-2.5-3-5(b). This section states, “The credit . . . does not apply to the use tax imposed on the use, storage, or consumption of vehicles . . . that are required to be titled, registered, or licensed by Indiana.”³⁰⁵

To address the first issue of whether Rhoades was exempt from paying use tax, the Tax Court acknowledged that a state imposes a use tax out of concern (1) that local merchants will lose business if taxpayers purchase goods out-of-state to avoid sales tax liability and (2) that it will lose tax revenue if taxpayers purchase goods out-of-state.³⁰⁶ It noted that “[t]o deal with this potential loss of business and revenue, states enacted ‘complementary’ or ‘compensating’ use taxes on the use of goods purchased outside of the state and brought into the state for use.” Lastly, the Tax Court recognized that a use tax is functionally equivalent to a sales tax and is levied when the use of tangible personal property is not subject to sales tax.³⁰⁷

With this foundation in place, the Tax Court focused on the two statutes raised by the parties in furtherance of their respective positions and opted to read them *in pari material*. It pointed out that Indiana Code section 6-2.5-3-6(d) did not expressly indicate whether the taxes are attributable to any state or just Indiana. On the other hand, it found that Indiana Code section 6-2.5-3-5(b) expressly denied any use tax credit for another state’s sales or use tax when a taxpayer purchases a vehicle out-of-state and is required to title it in Indiana. Thus, the Tax Court ruled that plain language of Indiana Code section 6-2.5-3-5(b) showed that the legislature intended the use tax in Indiana Code section 6-2.5-3-6(d) to refer to Indiana taxes only.³⁰⁸ The Tax Court denied Rhoades’s motion for summary judgment.

Regarding the second issue of whether imposition of Indiana use tax on a vehicle for which the taxpayer already paid sales tax in another state violates the Commerce Clause, the Tax Court turned to the four part test announced in *Complete Auto Transit, Inc. v. Brady*.³⁰⁹ In *Brady*, the U.S. Supreme Court wrote that a state tax will not withstand a Commerce Clause challenge if it (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the service provided by the state.³¹⁰ Rhoades claimed that

304. *Id.* (quoting IND. CODE § 6-2.5-3-6(d) (1998)).

305. *Id.* (quoting IND. CODE § 6-2.5-3-5(b) (1998)).

306. *Id.* (referencing JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, 2 STATE TAXATION § 16.01[2] (3d ed. 2000)).

307. *Id.* (referencing HELLERSTEIN & HELLERSTEIN, *supra* note 306, § 16.01[2]).

308. *Id.* at 1048-49.

309. 430 U.S. 274 (1977).

310. *Id.* (citing *Anderson v. Ind. Dep’t of State Revenue*, 758 N.E.2d 597, 601 (Ind. Tax. Ct. 2001)).

Indiana's use tax violated the third prong of this test. In view of this assertion, the Tax Court referred to an earlier decision *Bulkmatic Transport Co. v. Department of State Revenue* where it addressed the proof necessary to show discrimination against interstate commerce. The *Bulkmatic* court emphasized "a state tax impermissibly discriminates against interstate commerce when that state's taxing power increases the tax burden for out-of-state transactions, thereby coercing taxpayers to conduct intrastate rather than interstate business."³¹¹

Applying this standard to the present facts, the Tax Court noted that Rhoades was effectively taxed at a rate of 11% when he purchased his vehicle in Florida and registered it in Indiana.³¹² If he had purchased his vehicle in Indiana, he would, however, only been assessed a 5% tax rate. Accordingly, the Tax Court acknowledged strong financial disincentives to purchase a vehicle out-of-state. It thus ruled that Indiana's use tax directly discriminates against interstate commerce in violation of the Commerce Clause and denied the Department's motion for judgment on the pleadings.³¹³

2. *The Frame Station, Inc. v. Indiana Department of State Revenue*.³¹⁴—The Frame Station provides custom framing services for customers' artworks.³¹⁵ It records two subtotals—one for the frame itself and the other for the service of framing the artwork—on a customer's invoice. It collected sales tax, however, only on the cost of the frame. The Department determined that the framing services were also subject to taxation and submitted a Demand Notice for Payment to Frame Station in the amount of \$9,155.54 for sales and use tax, penalties, and interest for tax years 1993-95. Although Frame Station objected to the assessment, the Department denied the protest. Consequently, Frame Station paid the amount due, but filed a claim for a refund. The Department denied the refund, which lead Frame Station to appeal to the Tax Court.³¹⁶

The Tax Court addressed a single issue in this case—whether the custom framing service constitutes a retail unitary transaction subject to sales tax. Pursuant Indiana Code section 6-2.5-4-1(e), a retail unitary transaction is taxable to the extent that income from the transaction represents (1) the price of the property transferred; and (2) any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred *before* its transfer and which are separately stated on the transferor's records.³¹⁷ Given the express language, the Tax Court directed the heart of its analysis on whether the services were performed *before or after* Frame Station transferred the property

311. *Id.* (quoting *Bulkmatic Transp. Co. v. Ind. Dep't of State Revenue*, 691 N.E.2d 1371, 1377 (Ind. Tax Ct. 1998)).

312. *Id.* at 1050.

313. *Id.* at 1051.

314. 771 N.E.2d 129 (Ind. Tax Ct. 2001).

315. *Id.* at 130.

316. *Id.*

317. *Id.* at 130-31 (citing IND. CODE § 6-2.5-4-1(e) (1998)).

to its customers.³¹⁸ Frame Station argued that it frames artwork *after* it transfers the frame to the customer. In contrast, the Department stipulated that Frame States frames artwork *before* it transfers the frame to the customer.

To resolve the parties' contradictory viewpoints, the Tax Court recognized that transfer occurs when the buyer agrees to buy the property from a seller, pays the purchase price, and takes ownership and possession of the property.³¹⁹ It then stated that customers pay for their artwork *after* framing is complete upon pick-up. Therefore, the Tax Court ruled that Frame Station's framing services are performed *before* transfer and indeed constitute a taxable retail unitary transaction under Indiana Code section 6-2.5-4-1(e).³²⁰

3. *Chrysler Financial Co., LLC v. Indiana Department of State Revenue*.³²¹—Chrysler finances the sale of motor vehicles from Indiana dealers to consumers.³²² Specifically, a consumer may enter into an installment contract with a dealer to purchase a motor vehicle. The contract covers the price of the vehicle plus sales tax. In exchange for the financing, the dealer acquires a security interest in the vehicle. The dealer then assigns all rights, title, and interest in the contract to Chrysler. As consideration for the assignment, Chrysler pays the dealer the amounts due under the contract. The dealer then remits the sales tax to the Department.³²³

For select assignments issued from 1995 through the second quarter of 1997, some consumers defaulted on the contracts.³²⁴ After failed attempts to collect amounts due, Chrysler wrote the unpaid balances off as uncollectible debts for federal income tax purposes. It also filed a claim for a refund of sales tax in proportion to the sum of the unpaid balances pursuant to the Bad Debt Statute.³²⁵ By multiplying the unpaid principle by the 5% Indiana sales tax then in effect, Chrysler calculated their refund amount to be \$388,429. The Department denied the request, and Chrysler appealed to the Tax Court.

The Tax Court determined that Chrysler's refund claim actually involved three sub-issues: (1) whether dealers may assign their rights to sales tax deductions under the Bad Debt Statute to Chrysler; (2) whether Chrysler qualifies for the sales tax deduction under the Bad Debt Statute as the assignee; and (3) whether a sales tax refund is calculated by multiplying the unpaid principle of the bad debt by the sales tax rate.³²⁶

With regard the first sub-issue, Chrysler argued that common law, which favors assignment, should control because the Bad Debt Statute did not expressly forbid assignment. In contrast, the Department countered that assignment is

318. *Id.* at 131.

319. *Id.* (citing *Webb v. Clark County*, 159 N.E.2d 19, 20-1 (1927)).

320. *Id.*

321. 761 N.E.2d 909 (Ind. Tax Ct. 2002).

322. *Id.* at 910.

323. *Id.* at 911.

324. *Id.*

325. See IND. CODE § 6-2.5-6-9 (2002).

326. *Chrysler*, 761 N.E.2d at 911.

generally prohibited because the Bad Debt Statute does not expressly favor assignees. The Tax Court first noted that the Indiana Bad Debt Statute allowed merchants "to deduct from their gross retail income an amount equal to any receivables on which a merchant has remitted sales tax to the Department but has not collected the sales tax from the purchaser."³²⁷ It then acknowledged that the legislature expressly forbid assignment in many instances such as workers compensation claims and medical malpractice compensation. The Tax Court thus concluded that the absence of an express prohibition against assignment indicated that the legislature did not intend to minimize the common law of assignment. Accordingly, it ultimately agreed with Chrysler's position and ruled that dealers may assign their right to a sales tax deduction to Chrysler under the Bad Debt Statute.³²⁸

Second, the Department argued that even if a dealer may assign its rights to a sales tax deduction, Chrysler does not qualify for such a deduction because it is not a "retail merchant" under the Bad Debt Statute. Chrysler stipulated, however, that an assignee "stands in the shoes" of an assignor at common law. Hence, it contended that it does not matter whether it is an actual retail merchant. The Tax Court again agreed with Chrysler and found that Chrysler was entitled to a deduction as long as either the dealers themselves or Chrysler, as assignee, met the requirements of the Bad Debt Statute. The statute provides that "a retail merchant may deduct from his gross retail income an amount equal to his receivable that: (1) resulted from retail transactions in which the retail merchant did not collect the state gross retail or use tax from the purchaser; (2) resulted from retail transactions on which the retail merchant has previously paid the state gross retail or use tax liability to the department; and (3) were written off as an uncollectible debt for federal tax purposes during the particular reporting period."³²⁹ Here, the Tax Court recognized that the dealers and Chrysler satisfied all criteria. The dealers did not collect the sales tax from the consumers, although they previously paid such tax to the Department. Likewise, Chrysler wrote off the uncollectible debt. As a result, the Tax Court ruled that Chrysler is entitled to a sales tax deduction.³³⁰

Turning to the final issue, the Department asserted that Chrysler improperly calculated the amount of the refund by multiplying the unpaid principle by the sales tax rate. It suggested that the Department was entitled to retain all sales tax, regardless of default, based on Indiana's vehicle, watercraft title, and aircraft registration provision. Thus, the Department implied that the Bad Debt Statute was meaningless with regard to sales tax refunds.³³¹ Chrysler, on the other hand, argued that the calculation was in conformity with the Department's practice established in 1975. Particularly, it cited three Department documents support

327. *Id.* at 912.

328. *Id.* at 913.

329. *Id.* at 914.

330. *Id.* at 915.

331. *Id.* at 916.

Chrysler's calculation method.³³² The Tax Court recognized that the Bad Debt Statute was silent regarding the method by which a refund should be determined. Yet, it presumed that the legislature did not intend to enact meaningless legislation as suggested by the Department. The Tax Court consequently found that Chrysler used a reasonable means to calculate a sales tax refund.³³³

4. *Interstate Warehousing, Inc. v. Indiana Department of State Revenue*.³³⁴—Interstate Warehousing, Inc. ("Interstate") is an Indiana corporation and operates two refrigerated warehouses where food manufacturers and retailers store agricultural goods.³³⁵ Interstate produces the conditioned air used in the warehouses by chilling ammonia to a temperature that converts it from a gas to a liquid. The corporation charges customers based on the temperature required for refrigeration and the quantity of frozen food stored. It purchased electricity to chill the ammonia from Indianapolis Power and Light and PSI Energy. From 1993, to 1996, it paid \$91,566.85 in sales and use taxes for electricity. Interstate filed for a refund under the consumption exemption of Indiana Code section 6-2.5-5-5.1. The Indiana Department of State Revenue ("Department") denied the refund, and Interstate appealed to the Tax Court.

The court reviewed the consumption exemption, which provides that "transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business."³³⁶ The Tax Court determined that Interstate was involved in the direct production of other tangible personal property in its operation of producing conditioned air.³³⁷ By chilling the ammonia, Interstate created a significant change in the ammonia which, as a result, was capable of cooling air in the storage units. Interstate had created a new and marketable good by this operation and, in the terms of the statute, produced "other tangible personal property." Thus, the Tax Court decided that Interstate was entitled to the consumption exception. In reaching this conclusion, the Tax Court analogized to *Mid-America Energy Resources v. Indiana Department of State Revenue*.³³⁸ There, the taxpayer chilled and treated water for the purpose of conditioning air its customers' buildings. The Mid America court similarly decided that the taxpayer was involved in the direct production of a new and marketable good and therefore was entitled to the consumption exception.

332. *Id.*

333. *Id.*

334. 764 N.E.2d 313 (Ind. Tax Ct. 2002).

335. *Id.* at 314.

336. *Id.* (quoting IND. CODE § 6-2.5-5-5.1(a) (2002)).

337. *Id.* at 316.

338. 681 N.E.2d 259 (Ind. Tax Ct. 1997).

D. Inheritance Tax

In *Estate of Hagerman v. Indiana Department of State Revenue*,³³⁹ Theodore Hagerman ("Hagerman") funded a revocable trust in 1997.³⁴⁰ When he died in 1999, his spouse survived him. On January 31, 2000, his Estate filed an Indiana inheritance tax return and attached a written Schedule of Beneficiaries. The Estate listed "Theodore F. Hagerman 1997 Rev. Trust [Sched. E, Item 6] QTIP Election" adjacent to his wife's name with a value of \$602,398 on the Schedule.³⁴¹

The probate court determined the inheritance tax due on March 6, 2000. In doing so, it allowed the QTIP exemption for the Trust remainder. It also allowed certain deductions for expenses incurred in administering the property subject to inheritance tax. After auditing the inheritance tax return, the Department filed a Petition for Rehearing, Reappraisement and Redetermination of Inheritance and Transfer Tax, asserting that additional tax was due because the Estate did not make a valid QTIP election and improperly deducted certain expenses.³⁴² The probate court agreed with the Department and ordered the inheritance tax to be re-determined consistent with disallowance of the QTIP election.³⁴³ On April 20, 2001, the Estate filed its notice of appeal to the Tax Court on the grounds that the probate court erred in finding that the Estate did not make a valid QTIP election.

In rendering a decision on this issue, the Tax Court first explored the application of the Indiana inheritance tax. When a property interest is passed from a decedent to a surviving spouse, such interest is exempt from inheritance tax under Indiana Code section 6-4.1-3-7.³⁴⁴ Accordingly, no tax is due on the transfer of a life estate from a decedent spouse to a surviving spouse.³⁴⁵ Tax is, however, due on the transfer of a remainder interest, but it may be postponed via a QTIP election until the surviving spouse dies. At the date of death of the surviving spouse, the remaindermen will then pay the Indiana inheritance tax on the value of the entire property.³⁴⁶ A surviving spouse qualifies for this election only if he/she is entitled to all of the income for life and only if he/she has the power to appoint part of the property to a third person.³⁴⁷

The Tax Court then considered the requirements to achieve QTIP treatment. Per the Indiana regulations, a QTIP election must specifically identify the property being elected, be in writing, signed by the authorized person, and

339. 771 N.E.2d 120 (Ind. Tax Ct. 2001).

340. *Id.* at 123.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 124.

345. *Id.* (citing IND. CODE § 6-4.1-3-7(b)(2000) and *Inheritance Tax Div. v. Estate of Phelps*, 697 NE. 2d 506, 509 (Ind. Tax Ct. 1998)).

346. *Id.* (citing *Estate of Hibbs v. Ind. Dep't of State Revenue*, 636 N.E.2d 204, 207 (Ind. Tax Ct. 1994)).

347. *Id.* (citing *Estate of Hibbs*, 636 N.E.2d at 207).

attached to the original inheritance tax return.³⁴⁸ Additionally, the Tax Court noted that precedent also required that the election must “manifest an affirmative, unequivocal intent to elect Indiana QTIP treatment.”³⁴⁹

In the instant case, the Tax Court ruled that the estate did not attach a written election to the inheritance tax return that met the regulation requirements. It found an entry on the “Schedule of Beneficiaries” which read “Theodore F. Hagerman 1997 Rev. Trust [Sched. E, Item 6] QTIP Election” followed by the figure \$602,398 to be the only indication that the Estate sought QTIP treatment. Consequently, the Tax Court stated that the Estate failed to show an affirmative intent to make the election, offered no statement of understanding that the election was irrevocable, and included no signature on the “Schedule of Beneficiaries.”³⁵⁰ Thus, it affirmed the probate court’s decision to deny the QTIP election.

The Tax Court also affirmed the probate court’s decision to allow the Estate to take certain deductions on the Indiana inheritance tax return as opposed to the Indiana fiduciary tax return.³⁵¹ Although the Department argued that deductions on both tax returns would violate the regulations,³⁵² the Tax Court found no evidence to suggest that the Estate attempted such a double deduction.³⁵³ The Tax Court observed that the Estate had, in fact, not even filed a fiduciary tax return. Therefore, it ruled that any issue concerning the Estate’s deductions was not ripe for adjudication and beyond the subject matter jurisdiction of the court.³⁵⁴

E. Motor Carrier Fuel Tax:

1. *Waste Management of Indiana v. Indiana Department of State Revenue.*³⁵⁵—Waste Management handles and disposes of hazardous waste in Indiana.³⁵⁶ It operates commercial motor carrier using vehicles with specialized refuse collection equipment, winching and dumping mechanisms, and a common fuel reservoir. Waste Manage paid the Motor Carrier Fuel Tax (MCFT) at a rate of \$0.27 per gallon. During the period of July 27, 1999 to October 18, 1999, it filed five refund claims totaling \$369,599 for MCFT paid in five select quarters pursuant to Indiana Code sections 6-6-4.1-4(d) and 6-6-4.1-5(d). The Department denied the refund and claimed that it did not have the authority to issue refunds for the period between February 13, 1998, when the Tax Court issued its

348. *Id.* (citing IND. ADMIN. CODE tit. 45, r. 4.1-3-5(b)(4) (2001)).

349. *Id.* (quoting *Estate of Hibbs*, 636 N.E.2d at 209).

350. *Id.* at 126.

351. *Id.* at 129.

352. *Id.* at 128. *See also* IND. ADMIN. CODE tit. 45, r. 4.1-3-11 (1992).

353. *Estate of Hagerman*, 771 N.E.2d at 128.

354. *Id.*

355. 764 N.E.2d 318 (Ind. Tax Ct. 2002).

356. *Id.* at 319.

decisions in *Bulkmatic Transport Co. v. Indiana Department of State Revenue*³⁵⁷ and July 1, 1999, when the legislature amended the statute.³⁵⁸ Waste Management appealed this ruling to the Tax Court.

The Tax Court first explained the history and confusion around the MCFT within the state. It noted that the MCFT is a tax on fuel that is consumed by motor vehicles on Indiana highways.³⁵⁹ It then acknowledged that Indiana Code section 6-6-4.1-4(d) provided that the MCFT did not apply to the amount of motor fuel used to propel equipment mounted on a motor vehicle in Indiana prior to 1999. In 1998, this court rendered its *Bulkmatic II* and *III* decisions wherein it held that the "in Indiana" language of the code violated the Commerce Clause. In response, the legislature amended the code to remove this language in 1999. During the interim period between *Bulkmatic II* and *III* and the legislature's amendment, the Department was uncertain whether the *Bulkmatic II* and *III* decisions applied to the entire code section or only to the "in Indiana" language.³⁶⁰ The Tax Court recognized that this period of confusion coincided with the five quarters in dispute in the instant case.

The Tax Court clarified the effect of *Bulkmatic II* and *III* in *Jack Gray Transport, Inc. v. Department of State Revenue*.³⁶¹ In that case, the Tax Court found that the legislature did not intend to abolish the exemption in its entirety, but instead only sought to remove the "in Indiana" limitations. As a result, it instructed the Department to grant the exemption.³⁶²

Waste Management relied on the *Jack Gray* decision for support and argued that it should receive the refund because it met the statutory requirements for the exemption.³⁶³ The Department rebutted this argument by asserting that the *Bulkmatic II* and *III* voided the exemption in its entirety for the five quarters at issue. Citing *Wright v. Steers*,³⁶⁴ it contended that the Tax Court could not declare only certain clauses, such as "in Indiana," void. Instead, it maintained that that the Tax Court could only declare the entire exemption void. In considering the Department's argument, the Tax Court recognized that every code provision is severable, absent an exception.³⁶⁵ It then explained that the Department misread *Wright v. Steers* regarding sentence splitting. It clarified that a court should consider legislative intent, not a cannon against sentence splitting, when determining whether to sever part of a statute. That is, the Tax Court reasoned that a severance is permissible if the legislature would have passed the statute presented without the language in question.

357. 691 N.E.2d 1371 (Ind. Tax Ct. 1998) (*Bulkmatic II*); 715 N.E.2d 26 (Ind. Tax Ct. 1999) (*Bulkmatic III*).

358. *Waste Mgmt. of Ind.*, 764 N.E.2d at 319.

359. *Id.* at 320.

360. *Id.*

361. 744 N.E.2d 1071 (Ind. Tax Ct. 2001).

362. *Waste Mgmt. of Ind.*, 764 N.E.2d at 321.

363. *Id.*

364. 179 N.E.2d 721 (Ind. 1962).

365. *Waste Mgmt. of Ind.*, 764 N.E.2d at 321.

Next, the Tax Court struck the Department's affirmative defense that it merely sought to administer the exemption in a non-discriminatory manner by denying all refunds for the five quarters at issue. It stated "the question for the Department after *Jack Gray* is not whether to grant the [e]xemption; the [l]egislature intended for the [e]xemption to be granted. The question for the Department after *Jack Gray* simply is who qualifies for the [e]xemption."³⁶⁶ It further found that the Department had no option but to obey the Legislature and grant the exemption to those who qualified for it after *Jack Gray* and until the 1999 amendment. Thus, the Tax Court ruled that the Department should grant Waste Management's MCFT refund claim for the five quarters with interest.³⁶⁷

2. *Anderson v. Indiana Department of State Revenue*.³⁶⁸—Max Anderson, d.b.a. M.X. Express ("M.X. Express"), is an interstate carrier based in Indiana. M.X. Express paid the Motor Carrier Fuel Tax (MCFT) from January 1997 through June 1999 to the Department. In November 1999, however, M.X. Express submitted a claim to the Department for an MCFT refund of \$1,538.39 paid by the company on the Indiana Toll Road. M.X. Express also asserted that the MCFT violated the Commerce Clause. Later that month, the Department denied M.X. Express' claim. The company subsequently appealed to the Tax Court and requested that a class of carriers be certified for which M.X. Express would be the named representative. M.X. Express later moved for summary judgment on the issue of whether the MCFT violates the Commerce Clause.³⁶⁹

Regarding the class certification, the Tax Court applied Indiana Trial Rule 23(A), which states four necessary criteria: "(1) the potential class members must be so numerous that joinder of all members is impracticable; (2) questions of law or fact must be common to the class; (3) the claims or defenses of the representative party must be typical of the claims or defenses of the class; and (4) the representative party must be able to fairly and adequately protect the interests of the class."³⁷⁰ The Tax Court determined that counsel for M.X. Express had not provided "a sufficient foundation of fact showing M.X. Express's willingness and ability to serve as the named representative."³⁷¹ Consequently, it denied the class certification request.

On the issue of state taxation and the Commerce Clause, the Tax Court affirmed that the U.S. Supreme Court has not declared interstate commerce exempt from state taxation. Indeed, it acknowledged that "a state tax will withstand a Commerce Clause challenge if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is "fairly related" to the services provided by the State."³⁷² M.X. Express argued that the MCFT was not

366. *Id.* at 322.

367. *Id.* at 323.

368. 758 N.E.2d 597 (Ind. Tax Ct. 2002).

369. *Id.* at 598-600.

370. *Id.* at 600.

371. *Id.*

372. *Id.* at 601 (citing *Roehl Transp., Inc. v. Ind. Dep't of State Revenue*, 653 N.E.2d 539, 545

fairly related to services provided by the state. However, the Tax Court cited the U.S. Supreme Court's opinion in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*,³⁷³ which elaborated on the fair relation prong of the test. The Jefferson Lines explained that the relation is satisfied if the taxpayer has a substantial nexus with the state and the tax is reasonably related to the contact. The parties did not dispute that M.X. Express had a substantial nexus, so the Tax Court was left to decide only the reasonableness of the tax. Here, the Tax Court agreed that the tax was measured properly. It deemed that the tax was proportionate to the amount of fuel M.X. Express consumed on Indiana highways, as measured by the number of miles traveled. Accordingly, the Tax Court resolved that the MCFT was not a violation of the Commerce Clause and granted summary judgment for the Department.³⁷⁴

*F. Hospital Care for the Indigent Tax:
Griffin v. Department of Local Government Finance*³⁷⁵

In *Griffin I*,³⁷⁶ on April 3, 2002, the Tax Court held that the Hospital Care for the Indigent Tax ("HCIT") violated Article 10, Section 1 of the Indiana Constitution.³⁷⁷ It also ordered the nature and extent of Griffin's \$180.29 refund for tax years 1996-1998 to be considered in a separate proceeding. Consequently, Griffin filed a motion to grant his refund and enjoin collection of the HCIT for the present tax year on May 6, 2002.³⁷⁸ The Department of Local Government Finance ("Local Department") opposed this motion on June 17, 2002 and also requested the Tax Court to stay its *Griffin I* order concerning the constitutionality of the HCIT.³⁷⁹ Even beyond this single order, the Local Department also requested the Tax Court to stay the entire *Griffin I* decision, permit it time to appeal the decision to the Indiana Supreme Court, and give the legislature the opportunity to correct the HCIT.

The Tax Court framed the issue in the instant case as whether *Griffin I* should be given prospective effect only or whether retroactive relief should be granted. In rendering a decision, the Tax Court noted that retroactive relief might be denied in a case of first impression such as *Griffin I* where substantial inequities would result.³⁸⁰ To this end, the Tax Court considered testimony offered by both parties regarding the immediate harm of an unconstitutional HCIT versus the potential harm to Indiana's 750,000 Medicaid recipients if HCIT collection were enjoined.

(Ind. Tax Ct. 1995)).

373. 514 U.S. 175 (1995).

374. *Anderson*, 758 N.E.2d at 600-03.

375. 770 N.E.2d 957 (Ind. Tax Ct. 2002) (*Griffin II*).

376. 765 N.E.2d 716 (Ind. Tax Ct. 2002).

377. See *supra* notes 173-83 and accompanying text.

378. *Griffin II*, 770 N.E.2d at 958.

379. *Id.*

380. *Id.* at 959.

Griffin offered that HCIT revenue constituted only 1.25% of the State's four billion Medicaid budget.³⁸¹ Given this small percentage, Griffin argued that any effect of an HCIT refund on Medicaid would not outweigh the harm to taxpayers who were assessed an unconstitutional tax. In addition, he asserted that HCIT tax refunds would not jeopardize emergency medical care for indigents because the \$2 million of HCIT revenue spent for such care is a relatively small amount.³⁸² Moreover, while Griffin admitted that Family and Social Service Administration ("FSSA") could lose millions of federal matching funds as a result of a HCIT refund, he nonetheless offered that FSSA could employ other measures such as trimming its budget and cutting optional programs to combat the loss.³⁸³ Finally, he submitted evidence to show that over 160,000 persons have requested HCIT refunds to Lake County and that the County would not have ample funds to meet this demand.³⁸⁴

In contrast to Griffin's evidence, the Department stipulated that the State already factored HCIT revenue into its four billion Medicaid budget for fiscal year 2003 and that the State would lose \$126 million in Medicaid funds if the HCIT were not collected.³⁸⁵ Furthermore, the Department offered that FSSA in particular operated under a \$250 million budget shortfall in fiscal year 2001. It then stipulated that the agency would lose \$57 million in matching revenue if the HCIT were not collected.³⁸⁶

Taking into account the gloomy public financial state and the 160,000 present refund claims, the Tax Court denied Griffin's refund request and stayed *Griffin I* until January 1, 2003.³⁸⁷ It reasoned that the State should be afforded a reasonable period of time to fix the HCIT rate. In practical terms, this decision permitted the State to collect HCIT through the November 2002 installment of property taxes, but forbid assessment or collection after January 1, 2003.

381. *Id.* at 958.

382. *Id.* at 958-59.

383. *Id.* at 959.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 960.



RECENT DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

This Article surveys the most significant developments in Indiana tort law from October 1, 2001, through September 30, 2002. The Article has been confined solely to the review of court decisions, as the legislature did not enact any legislation that made significant changes affecting tort law during the survey period.

I. MEDICAL MALPRACTICE

A. *Statute of Limitations*

In *Shah v. Harris*,¹ the Indiana Court of Appeals considered under what facts and circumstances Indiana's "occurrence-based" medical malpractice statute of limitations could be applied as a "discovery-based" statute of limitations. The facts of this case were undisputed.² In July of 1991, Dr. Kirit C. Shah ("Dr. Shah") diagnosed Stan Harris ("Harris") with multiple sclerosis.³ Further, Harris ended his patient-physician relationship on April 12, 1993, when Dr. Shah moved out of the area.⁴ In July 1998, another one of Harris' physicians "allegedly correctly diagnosed his illness as a vitamin B-12 deficiency, rather than multiple sclerosis."⁵ This diagnosis came approximately seven years after Dr. Shah's diagnosis, and approximately five years after Harris and Dr. Shah had ended their patient-physician relationship.⁶ On July 24, 2000, Harris and his wife Nancy Harris (the "Harris") filed a proposed medical malpractice complaint with the Indiana Department of Insurance, and thereafter a complaint with the trial court.⁷ Thereafter, Dr. Shah filed a motion for summary judgment, which was denied by the trial court, and an appeal was taken to the Indiana Court of Appeals.⁸

On appeal, the court first noted that under the Indiana statute of limitations for medical malpractice, a malpractice claim "may not be brought against a

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1. 758 N.E.2d 953 (Ind. Ct. App. 2001).

2. *Id.* at 958.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 954.

8. *Id.*

health care provider based upon professional service or health care that was provided . . . unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect”⁹ The court further noted that this statute of limitations had “been upheld as constitutional when applied to all plaintiffs able to discover the alleged malpractice and injury within two years from the occurrence.”¹⁰ To the contrary, the court explained that, as provided by the Indiana Supreme Court in *Martin v. Richey* and *Van Dusen v. Stotts*, “under Article I, Sections 12 and 23 of the Indiana Constitution, the two year statute of limitations applicable to medical malpractice claims is unconstitutional as applied to plaintiffs . . . , who could not have discovered the injury with reasonable diligence within the two years of the alleged misconduct.”¹¹ Additionally, the court provided that in order to qualify under the exception to the “occurrence-based” medical malpractice statute of limitations, a plaintiff must have had “no information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and . . . resulting condition during the statutory period.”¹² Furthermore, the court considered the impact of the observations made in *Boggs v. Tri-State Radiology, Inc.*, where the supreme court stated that “medical malpractice plaintiffs will frequently, if not virtually always, have varying amounts of time within which to file their claims before an occurrence-based statute of limitations expires,” but that “as long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue.”¹³

The court then turned to address the present arguments before it under the guise of *Martin*, *Van Dusen*, and *Boggs*. In doing so, the court of appeals rejected Dr. Shah’s assertion that *Martin* and *Van Dusen* were distinguishable from the facts presented because those cases considered diseases with long latency periods.¹⁴ Rather, the court stated that it could “find no case law that would support the restriction of the analysis announced in *Martin* and *Van Dusen* to specific types of diseases, nor do we discern any public policy or common sense reason for doing so.”¹⁵

The court went on to synthesize the rulings of *Martin*, *Van Dusen*, and *Boggs* by stating that those cases created a “two-stage analysis for the application of Indiana’s two-year, medical malpractice limitation period.”¹⁶ First, the court noted that [i]f a claimant discovers the alleged malpractice and resulting injury, or possesses information that would lead a reasonably diligent person to such

9. *Id.* (quoting IND. CODE § 34-18-7-1(b) (1998)).

10. *Id.* (citing *Martin v. Richey*, 711 N.E.2d 1273, 1278 (Ind. 1999)).

11. *Id.* at 957 (citing *Martin*, 711 N.E.2d at 1284-85; *Van Dusen v. Stotts*, 712 N.E.2d 491, 493 (Ind. 1999)).

12. *Id.* (quoting *Van Dusen*, 712 N.E.2d at 493).

13. *Id.* at 958 (quoting *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 697 (Ind. 2000)).

14. *Id.*

15. *Id.*

16. *Id.*

discovery during the two-year period, then the purely occurrence-based limitation period is both applicable and constitutional, so long as the claim can reasonably be asserted before the period expires.”¹⁷ Second, the court considered the plaintiff who does not discover the alleged malpractice and resulting injury, and does not possess information that would lead to such discovery through reasonable diligence.¹⁸ Under this scenario, the court found that the Indiana Supreme Court intended a second-stage of analysis; namely, a determination of when a claimant should have discovered the alleged malpractice and resulting injury.¹⁹ This determination in turn established the date from which the two-year statute of limitations begins to run.²⁰ Lastly, the court noted that whether the medical malpractice statute of limitations is constitutional as applied is to be determined by the trial court on a case-by-case basis.²¹

Turning to the facts before it, the court of appeals determined that “the two-year statute of limitations began to run at the latest when Dr. Shah and Harris’ physician-patient relationship ended on April 12, 1993.”²² Moreover, the information available to a reasonably diligent person, did not enable the Harrises to discover Dr. Shah’s alleged malpractice, and Harris’ injury, until July 31, 1998.²³ As a result, the discovery-based statute of limitations was applicable, thus tolling the Harrises’ date to file a medical malpractice claim until July 31, 2000, two years from Harris’ discovery of his allegedly erroneous diagnosis.²⁴ Accordingly, the court of appeals affirmed the trial court’s order denying Dr. Shah’s motion for summary judgment.²⁵

In *Rogers v. Mendel*,²⁶ the court of appeals addressed the application of Indiana’s “occurrence-based” medical malpractice statute of limitations. Dr. L. Ralph Rogers (“Dr. Rogers”) performed a hysterectomy on Maryetta Mendel (“Mendel”) on December 9, 1993.²⁷ At that time, Dr. Rogers removed a tumor from Mendel, and had a laboratory test performed on the tissue.²⁸ The tissue tested positive for carcinoma.²⁹ However, at subsequent meetings between Mendel and Dr. Rogers, on December 17, 1993 and January 4, 1994, Dr. Rogers allegedly failed to inform Mendel of her test results.³⁰ In January 1995, Mendel

17. *Id.* (citing *Boggs*, 730 N.E.2d at 697-98; *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).

18. *Id.* at 959.

19. *Id.*

20. *Id.* (citing *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. 758 N.E.2d 946 (Ind. Ct. App. 2001).

27. *Id.* at 947.

28. *Id.*

29. *Id.*

30. *Id.* at 947-48.

began suffering from abdominal cramping and visited her family doctor, who referred Mendel to a colon specialist, through whom she was eventually referred to an oncologist, Dr. Fox.³¹ Dr. Fox informed Mendel that she had metastatic endometrial cancer and began Mendel on a course of chemotherapy.³² As a result of hematologic toxicity, Mendel was forced to discontinue chemotherapy and was referred to a GYN oncologist, who recommended Taxol treatments.³³ In February of 1996, during attempts to get Medicare reimbursement, Mendel's daughter requested and received the records of Dr. Rogers, which contained a December 1993 pathology report that indicated carcinoma in the tumor removed by Dr. Rogers.³⁴ On September 15, 1996, Mendel died of progressive metastatic endometrial cancer.³⁵

On December 30, 1996, the Mendels filed their proposed medical malpractice complaint with the Indiana Department of Insurance.³⁶ On March 14, 2000, the Medical Review Panel entered a decision in favor of the Mendels.³⁷ The Mendels filed a complaint in the trial court on May 31, 2000.³⁸ Thereafter, Dr. Rogers filed a motion for summary judgment, which was subsequently denied by the trial court.³⁹ Dr. Rogers brought an interlocutory appeal.⁴⁰

On appeal, the court, as it did in the companion case of *Shah v. Harris*,⁴¹ first noted that under the Indiana statute of limitations for medical malpractice, a malpractice claim "may not be brought against a health care provider based upon professional service or health care that was provided . . . unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect"⁴² The court further noted that this statute of limitations had "been upheld as constitutional when applied to all plaintiffs able to discover the alleged malpractice and injury within two years from the occurrence."⁴³ To the contrary, the court explained that, as provided by the Indiana Supreme Court in *Martin* and *Van Dusen*, "under Article I, Sections 12 and 23 of the Indiana Constitution, the two year statute of limitations applicable to medical malpractice claims is unconstitutional as applied to plaintiffs . . . , who could not have discovered the injury with reasonable diligence within the two years of the alleged misconduct."⁴⁴ Additionally, the court provided that in order to qualify under the

31. *Id.* at 948.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 953.

42. *Id.* at 955 (quoting IND. CODE § 34-18-7-1(b) (1998)).

43. *Id.* at 954 (citing *Martin v. Richey*, 711 N.E.2d 1273, 1278 (Ind. 1999)).

44. *Id.* at 957 (citing *Martin*, 711 N.E.2d at 1284-85; *Van Dusen v. Stotts*, 712 N.E.2d 491,

exception to the "occurrence-base" medical malpractice statute of limitations, "no information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and . . . the resulting condition during the statutory period."⁴⁵ Furthermore, the court considered the impact of the observations made in *Boggs*, where the supreme court stated that "medical malpractice plaintiffs will frequently, if not virtually always, have varying amounts of time within which to file their claims before an occurrence-based statute of limitations expires[,] but that "as long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue."⁴⁶

The court went on to synthesize the rulings of *Martin*, *Van Dusen*, and *Boggs* by stating that those cases created a "two-stage analysis for the application of Indiana's two-year, medical malpractice limitation period."⁴⁷ First, the court held that [i]f a claimant discovers the alleged malpractice and resulting injury, or possesses information that would lead a reasonably diligent person to such discovery during the two-year period, then the purely occurrence-based, limitation period is both applicable and constitutional, so long as the claim can reasonably be asserted before the period expires."⁴⁸ Second, the court considered the plaintiff who does not discover the alleged malpractice and resulting injury, and does not possess information that would lead to such discovery through reasonable diligence.⁴⁹ Under this scenario, the court found that the Indiana Supreme Court intended a second-stage of analysis; namely, a determination of when a claimant should have discovered the alleged malpractice and resulting injury.⁵⁰ Such a determination in turn establishes the date from which the two-year statute of limitations begins to run.⁵¹ Lastly, the court noted that whether the medical malpractice statute of limitations is constitutional as applied is to be determined by the trial court on a case-by-case basis.⁵²

In *Langman v. Milos*,⁵³ the Indiana Court of Appeals addressed whether plaintiffs had timely filed their medical malpractice complaint when such complaint was filed more than four years after the alleged malpractice. On February 7, 1993, the plaintiff, Lawrence Langman ("Lawrence"), was injured at his place of employment when a large piece of steel struck his left leg and foot.⁵⁴ Lawrence was immediately taken to a hospital, where his wound was

493 (Ind. 1999)).

45. *Id.* (quoting *Van Dusen*, 712 N.E.2d at 493).

46. *Id.* at 958 (quoting *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 697 (Ind. 2000)).

47. *Id.*

48. *Id.* (citing *Boggs*, 730 N.E.2d at 697-98; *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).

49. *Id.*

50. *Id.*

51. *Id.* (citing *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).

52. *Id.*

53. 765 N.E.2d 227, 229 (Ind. Ct. App. 2002).

54. *Id.*

cleansed and sutured.⁵⁵ Several days later, Lawrence met with Dr. Babcoke, who ordered Lawrence to physical therapy.⁵⁶ On April 23, 1993, Dr. Babcoke referred Lawrence to Dr. Koscielniak, an orthopedic surgeon.⁵⁷ After examining Lawrence, Dr. Koscielniak "believed that Lawrence's symptoms indicated Reflex Sympathetic Dystrophy ('RSD')."⁵⁸ As a result, Dr. Koscielniak recommended that Lawrence seek additional treatment, and suggested "sympathetic block."⁵⁹ Dr. Koscielniak referred Lawrence to Dr. Stinson, an anesthesiologist who conducted a pain clinic.⁶⁰

On May 8, 1993, Lawrence was admitted to the hospital and underwent an insertion of an epidural catheter.⁶¹ After receiving the catheter, Lawrence "reported a pain level of zero," but, his mobility had decreased.⁶² "Lawrence then began physical therapy, at which point he noticed increased pain."⁶³ Lawrence was administered Valium and again reported a decrease in pain.⁶⁴ Lawrence was discharged from the hospital three days later.⁶⁵

During the summer of 1993, Lawrence also met several times with a Dr. Javors.⁶⁶ In order to diagnose Lawrence, Dr. Javors ordered several diagnostic tests, including a bone scan, an electromyography ("EMG"), and a magnetic resonance imaging ("MRI") of Lawrence's foot.⁶⁷ On June 11, 1993, following Dr. Javors' review of these tests, he concluded that Lawrence did in fact suffer from RSD.⁶⁸ On September 1, 1993, Dr. Javors gave Lawrence a Permanent Partial Impairment rating for purposes of worker's compensation.⁶⁹ A letter, dated October 11, 1995, indicated that Lawrence "should be permanently restricted from climbing ladders, walking on uneven ground, and walking on beams."⁷⁰ After settling his worker's compensation claim in November 1993, Lawrence did not see Dr. Javors again.⁷¹

Lawrence next met with Dr. Milos in October 1994.⁷² At this time, Lawrence complained of severe pain in his left foot and allegedly informed Dr. Milos of

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 229-30.

60. *Id.* at 230.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

being diagnosed with RSD.⁷³ Dr. Milos prescribed pain medication for Lawrence, and referred Lawrence for an EMG.⁷⁴ On November 19, 1994, following laboratory work, an arthritis profile, and more pain medication, Dr. Milos decided that Lawrence needed surgery.⁷⁵ Dr. Milos referred Lawrence to Dr. Smith for surgery on his left foot.⁷⁶

On December 28, 1994, Dr. Smith performed surgery on Lawrence's left foot to remove two bone coalitions.⁷⁷ During post-operative visits with Lawrence, Dr. Milos noted that Lawrence had increased his activity against Dr. Milos' orders.⁷⁸ Until March 1995, Dr. Milos' notes further stated that Lawrence "was healing well with continuous improvement."⁷⁹ On March 4, 1995, Lawrence again reported pain in his left foot.⁸⁰ From March through August of 1995, Lawrence underwent injection therapy, received several referrals from Dr. Milos, and received numerous prescriptions for pain medicine.⁸¹

In July 1995, one of the doctors to whom Lawrence was referred, Dr. Kozelka, ordered several additional diagnostic tests for Lawrence.⁸² Lawrence did not follow up with treatments or diagnostic testing with Dr. Kozelka.⁸³ Dr. Milos' last encounter with Lawrence was when his office telephoned in a prescription for pain killers for him on August 7, 1995.⁸⁴

Lawrence's subsequent visit to a doctor for his left foot, ankle, and leg, took place in February 1998, when he met with Dr. Fedorchak, a podiatrist.⁸⁵ Dr. Fedorchak informed Lawrence that the surgery recommended by Dr. Milos, and performed by Dr. Smith, should not have been done.⁸⁶ Dr. Fedorchak referred Lawrence to Dr. Dallas-Prunskis.⁸⁷ Dr. Dallas-Prunskis first met with Lawrence on February 12, 1998, and noted then that Lawrence was not properly treated for his RSD.⁸⁸ Dr. Dallas-Prunskis treated Lawrence until August of 1999.⁸⁹

On October 6, 1999, the Langmans filed a proposed complaint with the Indiana Department of Insurance.⁹⁰ The Langmans alleged in part "that Drs.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 231.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 231-32.

83. *Id.* at 232.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 232-33.

Milos and Smith negligently performed surgery on him, causing his pain to increase and his RSD to advance.”⁹¹ On November 28, 2000, Drs. Milos and Smith filed a joint motion for summary judgment alleging that the “Langmans’ suit was barred by the two-year medical malpractice statute of limitations.”⁹² On August 14, 2001, the trial court granted the motion for summary judgment, finding “that it would be unreasonable to assume that the Langmans were not aware of the underlying disease, the changes in Lawrence’s condition, and other things that would have provided them with adequate notice of his potential claim of malpractice.”⁹³

On appeal, the court of appeals applied the two-stage analysis for determining the application of Indiana’s two-year medical malpractice limitation period as addressed in *Shah v. Harris* and *Rogers v. Mendel*.⁹⁴

Under the facts of *Langman*, the court held that it was clear that both Lawrence and his wife were aware of Lawrence’s increased pain within months of his December 1994 surgery.⁹⁵ Moreover, the court noted Lawrence’s admission that he felt worse within months of the surgery and his related communication to Dr. Milos.⁹⁶ In summary, the court found that “although Lawrence’s worsened and worsening symptoms would have led a reasonably diligent person to discover the alleged malpractice and resulting injury, he did not seek medical assistance for anything related to his left foot, ankle or leg until February 2, 1998, nearly two and one-half years after his last visit with Dr. Milos.”⁹⁷ Therefore, the court held that the facts did not pass the first stage of the *Shaw* and *Rogers* analysis and affirmed the trial court’s grant of summary judgment in favor of Drs. Milos and Smith.⁹⁸

In *Johnson v. Gupta*,⁹⁹ the Indiana Court of Appeals addressed whether the plaintiff had timely filed her medical malpractice complaint when it was filed approximately four years and four months after the alleged act of malpractice. In September 1990, Dr. Arjun Gupta performed a hemorrhoidectomy and mucopexy on the plaintiff, Charlotte Johnson (“Johnson”).¹⁰⁰ Thereafter, Johnson began experiencing fecal incontinence.¹⁰¹ Dr. Gupta (“Dr. Gupta”) assured Johnson that the symptoms would disappear.¹⁰² Johnson saw other

91. *Id.* at 233.

92. *Id.*

93. *Id.*

94. *Id.* at 234 (citing *Shah v. Harris*, 758 N.E.2d 953 (Ind. Ct. App. 2001); *Rogers v. Mendel*, 758 N.E.2d 946 (Ind. Ct. App. 2001)).

95. *Id.* at 236.

96. *Id.*

97. *Id.* at 235-36.

98. *Id.* at 236.

99. 762 N.E.2d 1280 (Ind. Ct. App. 2002) (*Johnson II*).

100. *Id.*

101. *Id.*

102. *Id.*

doctors to help determine the cause of her incontinence.¹⁰³ In 1994, a doctor in Ohio discovered that her rectum had been severed during her surgery in 1990, resulting in a complete and total loss of her anal sphincter.¹⁰⁴ Johnson was informed that the only treatment for this condition was a colostomy.¹⁰⁵

In a previous appeal,¹⁰⁶ the court of appeals affirmed a grant of summary judgment in favor of Dr. Gupta on the grounds that the "occurrence-based" statute of limitations in Indiana's Medical Malpractice Act did not violate article I, section 12, and article 1, section 23 of the Indiana Constitution.¹⁰⁷ After this decision, Johnson petitioned the Indiana Supreme Court for transfer, and transfer was granted.¹⁰⁸ On transfer, the supreme court remanded the case to the trial court for further proceedings consistent with the opinions contained in *Van Dusen*¹⁰⁹ and *Martin*,¹¹⁰ which discussed the constitutionality of the medical malpractice statute of limitations.¹¹¹

On remand, the trial court determined that the "occurrence-based" statute of limitations was constitutional as applied to *Johnson I*, and again entered summary judgment in favor of Dr. Gupta.¹¹² Johnson appealed that decision.¹¹³ On appeal, the court of appeals analyzed the case in light of the Indiana Supreme Court's holdings in *Van Dusen* and *Martin*.¹¹⁴

The court first noted the changes brought about by *Van Dusen* and *Martin*, by quoting the following passage from *Van Dusen*:

The question of when a plaintiff discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury, is often a question of fact. In general, however, a plaintiff's lay suspicion that there may have been malpractice is not sufficient to trigger the two-year period. At the same time, a plaintiff need not know with certainty that malpractice caused his injury, to trigger the running of the statutory time period. Moreover, when it is undisputed that plaintiff's doctor has expressly informed a plaintiff that he has a specific injury and that there is a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time, then the question may become one of law. Under such circumstances, generally a plaintiff is deemed to have sufficient facts to

103. *Id.*

104. *Id.*

105. *Id.*

106. 682 N.E.2d 827 (Ind. Ct. App. 1997) (*Johnson I*).

107. *Johnson II*, 762 N.E.2d at 1280-81 (citing IND. CODE § 34-18-7-1).

108. *Id.* at 1281.

109. 712 N.E.2d 491 (Ind. 1999).

110. 711 N.E.2d 1273 (Ind. 1999).

111. *Johnson II*, 762 N.E.2d at 1281.

112. *Id.*

113. *Id.*

114. *Id.*

require him to seek promptly any additional medical or legal advice needed to resolve any remaining uncertainty or confusion he may have regarding the cause of his injury and any legal recourse he may have, and his unexplained failure to do so should not excuse a failure to timely file a claim. Thus, in such a case, we conclude that the date on which he receives such information—that is, information that there is a reasonable possibility that a specific injury was caused by a specific act at a specific time—is the date upon which the two-year period begins to run.¹¹⁵

The court then proceeded to apply such principles to the facts in Johnson's case.¹¹⁶

The court noted that almost immediately after Johnson's surgery, on September 11, 1990, she "'knew there was something wrong' and became incontinent of stool."¹¹⁷ Moreover, the court found that upon Johnson's visit to Dr. Gupta's partner, Dr. Piatak, on January 24, 1992, Johnson continued to suffer from incontinence, and was that day informed by Dr. Piatak that she had no rectal tone.¹¹⁸ Yet, Johnson did not again consult with a physician regarding her incontinence until August or September 1994, when she saw Dr. Streeter.¹¹⁹ Thereafter, on September 27, 1994, Johnson was informed by Dr. Strong of the Cleveland Clinic that the laser surgery performed by Dr. Gupta on September 11, 1990, had "irreparably severed" her rectal muscles.¹²⁰

The court rejected Johnson's contention that she had suffered a "latent injury" within the meaning of *Van Dusen* and *Martin*, holding in part that "*Van Dusen* did not, as Johnson implies, establish that the statute of limitations is tolled until the patient discovers a causal link between the physician's actions and the patient's injury."¹²¹ Rather, the court explained that "latent injury," as defined under *Van Dusen*, was intended "where a patient suffers no discernible pain or symptoms until several years after the alleged malpractice."¹²² Thus, the court discerned that under *Van Dusen* and *Martin* the medical malpractice statute of limitations "is tolled until the patient experiences symptoms that would cause a person of reasonable diligence to take action that would lead to the discovery of the malpractice."¹²³ Applying this rule of law, the court of appeals held that "on January 24, 1992, at the latest, Johnson had discovered facts that, in the exercise of reasonable diligence, should have lead to the discovery of the malpractice."¹²⁴ Accordingly, the court affirmed the trial court's grant of

115. *Van Dusen v. Stotts*, 712 N.E.2d 491, 499 (Ind. 1999) (citation omitted).

116. *Johnson II*, 762 N.E.2d at 1281.

117. *Id.* (citing Brief for Appellant at 5).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1283.

122. *Id.*

123. *Id.*

124. *Id.*

summary judgment in favor of Dr. Gupta.¹²⁵

In *Jacobs v. Manhart*,¹²⁶ the court of appeals addressed the application of Indiana's medical malpractice statute of limitations within the context of plaintiffs who filed a medical malpractice claim after the running of the occurrence-based statute of limitations, but prior to the running of the discovery-based statute of limitations. The plaintiff, Manhart, had a PAP smear in February of 1996.¹²⁷ Manhart's PAP smear indicated severe dysplasia.¹²⁸ Shortly after her diagnosis, Manhart underwent a colposcopy.¹²⁹ A month after her colposcopy, Manhart had a biopsy.¹³⁰ Manhart was then instructed to have a follow-up PAP smear at three months, six months, and one year.¹³¹ Manhart's three month PAP smear, taken on June 20, 1996, indicated that she still had "marked dysplasia."¹³² Manhart's "doctor explained that such abnormal results were to be expected so soon after the biopsy. [Manhart] had follow-up PAP smears taken in October 1996, February 1997, and again in November 1997; the results of all three were reported as normal."¹³³ In February of 1998, Manhart discovered that she was pregnant, and on February 12, she had a PAP smear pursuant to her obstetrician's order.¹³⁴ The specimen was analyzed by South Bend Medical Foundation, Inc. ("SBMF") and read by Dr. Kristin M. Jacobs ("Jacobs").¹³⁵ Thereafter, Manhart's obstetrician received notice that the results of the PAP smear were normal.¹³⁶ On March 11, 1999, approximately eight months after the birth of twins, Manhart had another "routine examination and PAP smear."¹³⁷ Again, Manhart was told that the results of the PAP smear were normal.¹³⁸

In June 1999, Manhart began to experience "breakthrough bleeding."¹³⁹ Manhart thought the bleeding was from use of birth control pills, so thinking, she sought and received a different prescription for birth control pills, but the bleeding continued.¹⁴⁰ On August 24, 1999, an ultrasound revealed that Manhart had a "large tumor."¹⁴¹ A subsequent second opinion confirmed the diagnosis of

125. *Id.*

126. 770 N.E.2d 344 (Ind. Ct. App. 2002).

127. *Id.* at 346.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 347.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

cancer and indicated that her cancer was at "Stage III or IV, the highest stage."¹⁴² On September 3, 1999, Manhart underwent a radical hysterectomy.¹⁴³

In October 1999, at the request of Manhart, a cytotechnologist and family friend, Nora Clark ("Clark"), reviewed the slides from Manhart's previous PAP smears.¹⁴⁴ Sometime between Thanksgiving and Christmas of 1999, Clark informed Manhart of her opinion that "some of the [PAP smear] slides had been misread."¹⁴⁵ Between Christmas 1999 and the New Year, Clark, at the request of Manhart, forwarded Manhart's PAP smear slides to a pathologist ("Dr. Clark") for his review.¹⁴⁶ The pathologist's report, dated April 13, 2000, indicated that he agreed with some of the readings of Manhart's PAP smear slides, but disagreed with others.¹⁴⁷

Thereafter, on May 16, 2000, Manhart and her husband (collectively "plaintiffs") filed their proposed complaint for medical malpractice with the Indiana Department of Insurance.¹⁴⁸ The plaintiffs subsequently filed their complaint in the trial court on May 19, 2000, and alleged that SBMF and Jacobs "failed to comply with the applicable standards of care."¹⁴⁹ "On September 20, 2000, SBMF filed a motion for preliminary determination upon the issue of the medical malpractice statute of limitation"¹⁵⁰ The trial court denied SBMF's motion for preliminary determination, as well as SBMF's motion to reconsider, but granted SBMF's motion to certify the trial court's order for interlocutory appeal.¹⁵¹

On appeal, the appellate court examined the applicable medical malpractice statute of limitations and further noted that the Indiana Supreme Court had construed Indiana's medical malpractice statute of limitation as an "occurrence-based" statute rather than a "discovery-based" statute.¹⁵²

It was undisputed on appeal that the alleged malpractice asserted against SBMF occurred in February 1998.¹⁵³ It was also undisputed that the plaintiffs did not file their complaint against SBMF until May 2000.¹⁵⁴ Thus, the court explained that by its terms, Indiana's two-year medical malpractice statute of limitations barred the plaintiff's claim.¹⁵⁵ The plaintiffs argued that Indiana's medical malpractice statute of limitations was unconstitutional as applied to

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 328.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 349 (quoting *Martin v. Richey*, 711 N.E.2d 1273, 1278 (Ind. 1999)).

153. *Id.*

154. *Id.*

155. *Id.*

them.¹⁵⁶ In addressing this argument, the court of appeals first noted that “our occurrence-based malpractice statute of limitation has been upheld as constitutional on its face under Article 1, Sections 12 and 23 of the Indiana Constitution.”¹⁵⁷ However, the court further recognized “that under some circumstances, the statute of limitation is unconstitutional as applied to plaintiffs who, in the exercise of reasonable diligence, could not have discovered the alleged malpractice within the two-year limitation period.”¹⁵⁸

Relying on *Martin*, *Van Dusen*, and *Boggs*, the court noted that the “first step” to analyzing Manhart’s claim was to “determine when the alleged malpractice occurred and thus, when the two-year statutory period expired.”¹⁵⁹ “[T]he next step is to determine the ‘discovery date.’”¹⁶⁰ Then, the court stated, that if the discovery date falls within the two-year limitation period, a third stage of analysis is necessary to determine “whether the time which remains of the limitation period is reasonable rendering the occurrence-based statute of limitations constitutional as applied.”¹⁶¹ Alternatively, the court of appeals noted that if the “discovery date” was found to be after the expiration of the occurrence-based statute of limitation, then the limitation period would be unconstitutional as applied to the plaintiffs’ claim.¹⁶²

When applying the aforementioned process to determine the viability of the plaintiffs’ claim, the court of appeals held that Manhart was “on notice that there was a reasonable possibility” that her tumor had gone undetected as a result of SBMF’s malpractice upon receiving Dr. Clark’s report.¹⁶³ In so holding, the court noted that Manhart “closely monitored her condition, and up until August 24, 1999, when she was diagnosed with cervical cancer, there [was] no evidence that [she] had any information, which in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury.”¹⁶⁴ Moreover, the court, considering the totality of the circumstances, concluded “that it was a practical impossibility for Ms. Manhart to assert her claim before the expiration of the limitation period and that the rigid application of the occurrence-based statute would deny her the meaningful opportunity to pursue her claim.”¹⁶⁵ Consequently, the court of appeals determined that the plaintiffs’ medical malpractice claim was not barred by the statute of limitations.¹⁶⁶

156. *Id.*

157. *Id.* (citing *Martin*, 711 N.E.2d at 1279).

158. *Id.* at 349-50 (quoting *Van Dusen v. Scotts*, 712 N.E.2d 491, 495 (Ind. 1999)).

159. *Id.* at 352.

160. *Id.*

161. *Id.* (citing *Boggs*, 730 N.E.2d at 697).

162. *Id.* at 352 (citing *Van Dusen*, 712 N.E.2d at 497).

163. *Id.* at 354.

164. *Id.*

165. *Id.* at 355.

166. *Id.*

B. Sufficiency of Physician's Affidavit

In *McIntosh v. Cummins*,¹⁶⁷ the court of appeals addressed "whether the trial court erred in finding a genuine issue of material fact in a motion for summary judgment supported by a favorable medical review panel opinion and opposed only by the testimony of a family practitioner."¹⁶⁸ In October 1992, Cummins fractured his right femur and hip which required Dr. McIntosh to perform surgery and insert an intramedullary nail in Cummins' femur and to fixate his hip with screws.¹⁶⁹ In December 1992, Dr. McIntosh took an x-ray of Cummins' femur and the results noted a "paucity of callus formation at the distal femoral fracture."¹⁷⁰ In January 1993, x-ray results noted an "interval improvement in the callus formation," and Dr. McIntosh instructed Cummins to "gradually increase weight bearing."¹⁷¹

Cummins was released back to work in April 1993, and, in June 1993, Cummins "felt something strange in his leg."¹⁷² X-ray results discovered that the intermedullary nail had broken and a second surgery was required to replace the nail.¹⁷³ After the second surgery, Cummins experienced more pain, and it was discovered that there was a misalignment which was putting stress on his knee.¹⁷⁴ Cummins proceeded to see another physician and, after his pain had not subsided, he was referred to another physician who performed a bone graft.¹⁷⁵

In June 1995, "Cummins filed his proposed complaint with the Indiana Department of Insurance, alleging that Dr. McIntosh breached the applicable standard of care by permitting Cummins to return to work and to full weight bearing without the benefit of x-rays to determine if the bones had properly healed."¹⁷⁶ "The Medical Review Panel issued its opinion finding that 'the evidence does not support the conclusion that Defendant, Brent R. McIntosh, M.D., failed to meet the applicable standard of care as charged in the Complaint.'"¹⁷⁷ In May 1999, Cummins brought an action in the trial court and, in June 1999, Dr. McIntosh moved for summary judgment attaching the Medical Review Panel opinion in support of his argument.¹⁷⁸ Cummins' filed his response attaching the affidavit of Dr. Norman Glanzman, a family practitioner.¹⁷⁹ Dr. Glanzman stated in his affidavit that he had an opportunity to treat numerous

167. 759 N.E.2d 1180 (Ind. Ct. App. 2001).

168. *Id.* at 1182.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1182-83.

177. *Id.* at 1183.

178. *Id.*

179. *Id.*

individuals with fractures and to review their x-rays for adequate healing, and that he was of the opinion that Dr. McIntosh deviated from the standard of care in the treatment of Cummins by failing to take an x-ray to determine if sufficient healing had taken place before releasing Cummins to return to work and to full weight bearing.¹⁸⁰ The trial court denied Dr. McIntosh's motion for summary judgment.

On interlocutory appeal, Dr. McIntosh contended that "the evidence Cummins utilized to establish a genuine issue, Dr. Glanzman's affidavit, was insufficient because Dr. Glanzman failed to state he was familiar with the applicable standard of care."¹⁸¹ The court of appeals noted that in a medical malpractice action, an opposing affidavit submitted to establish that a defendant doctor breached the applicable standard of care must set forth that the expert is familiar with the proper standard of care under the same or similar circumstances, what that standard of care is, and that the defendant's treatment of the plaintiff fell below the standard.¹⁸²

Dr. Glanzman's opposing affidavit stated that he:

1. was a licensed medical physician within the State of Indiana
2. was the Medical Coordinator of Helix Health which is a multi-disciplinary health center which specializes in returning individuals with serious injuries, including bone fractures
3. has reviewed the depositions of Mr. Cummins, the defendant, and reviewed Dr. McIntosh's medical records for the plaintiff.
4. had an opportunity to treat numerous individuals with fractures and review their x-rays for adequate healing, and [is] of the opinion that Dr. McIntosh deviated from the standard of care.¹⁸³

The court stated, "although the affidavit does not directly state that Dr. Glanzman is familiar with the applicable standard of care, it is evident from the content of the affidavit that Dr. Glanzman's employment and experience made him indeed familiar with the applicable standard in the treatment of bone fractures and x-rays."¹⁸⁴ In addition, the court observed that it had previously held that an affidavit which establishes an expert's credentials, states that the expert has reviewed the relevant medical records, and sets forth the expert's conclusions that the defendant violated the standard of care in their treatment, which in turn caused the complained of injury, is sufficient to demonstrate the existence of a material fact, thus making summary judgment inappropriate.¹⁸⁵

Dr. McIntosh also argued that the affidavit was not sufficient because Dr. Glanzman practiced a completely different specialty than Dr. McIntosh; Dr. Glanzman was a family practitioner and Dr. McIntosh was an orthopedic

180. *Id.*

181. *Id.* at 1184.

182. *Id.* (quoting *Lusk v. Swanson*, 753 N.E.2d 748, 753 (Ind. Ct. App. 2001)).

183. *Id.*

184. *Id.*

185. *Id.* (quoting *Jones v. Minick*, 697 N.E.2d 496, 499 (Ind. Ct. App. 1998)).

surgeon.¹⁸⁶ However, the court stated that “there is no requirement that the expert physician be of the same specialty as the defendant doctor.”¹⁸⁷ The court went on to say that “[p]rovided there is at least a generalized and supportable conclusion by the affiant that he is familiar with the applicable standard of care, the specific knowledge of an expert witness is neither determinative of the witness’ qualification as an expert nor the admissibility of his opinion into evidence.”¹⁸⁸ Furthermore, “[a] witness’ competency is determined by his knowledge of the subject matter generally, and his knowledge of the specific subject of inquiry goes to the weight to be accorded his opinion, not its admissibility.”¹⁸⁹ The court concluded, “the fact that Dr. Glanzman is a family practitioner and not an orthopedic surgeon is not dispositive.”¹⁹⁰

Finally, Dr. McIntosh argued that Dr. Glanzman admitted in his deposition testimony that he was not familiar with the applicable standard of care, and his testimony must therefore be excluded.¹⁹¹ However, Cummins pointed to deposition testimony where Dr. Glanzman testified that he was an expert in callus formation, and that he had treated numerous post-fracture patients.¹⁹² The court noted that “[e]ven if facts are not in dispute, summary judgment is inappropriate if conflicting inferences arise.”¹⁹³ In applying this deferential standard, the court agreed with the trial court and resolved the conflicts in favor of Cummins as the non-movant.¹⁹⁴

The court concluded that “the trial court properly determined that Dr. Glanzman’s affidavit was sufficient to raise a genuine issue of material fact.”¹⁹⁵

II. PREMISES LIABILITY

In *Lawson v. Lafayette Home Hospital*,¹⁹⁶ the court of appeals addressed whether municipal ordinances that require abutting property owners or occupiers to remove snow and ice from public sidewalks create, as a matter of law, a duty under which an owner or occupier may be held liable to third party pedestrians. Lawson slipped and fell on ice on a public sidewalk adjacent to Lafayette Home Hospital (“Hospital”). The Hospital had shoveled the sidewalk prior to Lawson’s fall.¹⁹⁷ Lawson brought suit against the Hospital “alleging that the Hospital’s

186. *Id.*

187. *Id.* (quoting *Snyder v. Cobb*, 638 N.E.2d 442, 446 (Ind. Ct. App. 1994)).

188. *Id.* at 1185 (quoting *Snyder*, 638 N.E.2d at 446; see also *Aldrich v. Coda*, 732 N.E.2d 243, 245 (Ind. Ct. App. 2000)).

189. *Id.* (quoting *Snyder*, 638 N.E.2d at 446).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. 760 N.E.2d 1126 (Ind. Ct. App. 2002).

197. *Id.* at 1128.

negligence in failing to warn visitors of the dangerous condition or failing to warn visitors to the Hospital of the dangerous condition was the direct and proximate result of Lawson's personal injuries."¹⁹⁸ The Hospital moved for summary judgment asserting that it had no duty to keep public sidewalks owned by the city of Lafayette cleared of ice and snow. The Hospital also alleged that it did not assume a duty by creating an artificial condition that increased the risk of harm to Lawson.¹⁹⁹ Finding that the Hospital owed no duty of care to Lawson, the trial court granted summary judgment in the Hospital's favor. Lawson's appeal ensued.²⁰⁰

On appeal, Lawson argued that the Hospital, by shoveling the sidewalks, assumed a duty to maintain the public sidewalks adjacent to its building and that its attempts at snow removal increased the risk of harm to Lawson.²⁰¹ The court observed that in order for Lawson to prevail in his negligence action, he must demonstrate that "the Hospital: 1) owed him a duty, 2) that the Hospital breached its duty, and 3) that the breach proximately caused Lawson's injuries."²⁰² Moreover, the court noted that "[i]t is well settled in Indiana that an owner or occupant of property abutting a public street or sidewalk has no duty to clear those streets and sidewalks of ice and snow. . . . Additionally, municipal ordinances that require abutting owners or occupiers to remove snow and ice from public sidewalks do not, as a matter of law, create a duty under which an owner or occupier can be held liable to third party pedestrians."²⁰³ Despite this precedent, Lawson maintained that the Hospital assumed a duty.²⁰⁴

The court opined that "[i]n Indiana, persons are held to have assumed a duty to pedestrians on public sidewalks only when they create artificial conditions that increase the risk and proximately cause injury to persons using those sidewalks."²⁰⁵ The court next noted that Indiana has never recognized the removal of ice and snow to be an artificially created condition that increased the risk of harm to pedestrians.²⁰⁶ Instead, the court asserted that "such efforts to reduce danger to pedestrians are generally considered desirable and worthy, and should not be discouraged by holding such persons liable simply because they endeavor to do so."²⁰⁷ The court affirmed the judgment of the trial court.²⁰⁸

In *Wellington Green Homeowners' Association v. Parsons*,²⁰⁹ the court of

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1129.

202. *Id.* (citing *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 970-71 (Ind. 1999)).

203. *Id.* (citing *Hirschauer v. C&E Shoe Jobbers, Inc.*, 436 N.E.2d 107, 110-11 (Ind. Ct. App. 1982) (citations omitted) (citing *Carroll v. Jobe*, 638 N.E.2d 467, 471 (Ind. Ct. App. 1994)).

204. *Id.*

205. *Id.* at 1130.

206. *Id.*

207. *Id.* (quoting *Halkias v. Gary Nat'l Bank*, 234 N.E.2d 652, 654 (Ind. App. 1968)).

208. *Id.*

209. 768 N.E.2d 923 (Ind. Ct. App. 2002).

appeals addressed whether a homeowners' association could be held liable for injuries to an invitee when they had no notice of the hidden defect that caused the harm. Parsons, a mail carrier, delivered mail to a condominium association owned by Wellington Green Homeowners' Association.²¹⁰ Mail receptacles for residents were clustered in one location known as a "multi-box mailbox."²¹¹ Parsons experienced difficulty in opening a multi-box mailbox; ultimately, the multi-box unit came off the wall and threw Parsons off balance.²¹² Consequently, Parsons sustained injuries.²¹³ Parsons brought suit against Wellington Green Homeowners' Association and Kirkpatrick Management Company (hereinafter collectively referred to as "homeowners' association"). The jury found the defendants 80% at fault and awarded Parsons \$180,000.00 in damages.²¹⁴

On appeal, the homeowners' association argued that the trial court erred in denying their motions for judgment on the evidence.²¹⁵ Specifically, the homeowners' association argued that "even though Parsons was an invitee, they cannot be held liable, because they had no notice of the hidden defect that allegedly caused Parsons' injuries."²¹⁶

The court began its analysis by noting that the question of whether a duty to exercise care exists is dictated by the relationship of the parties and "is an issue of law within the province of the court."²¹⁷ Recognizing that Parsons was an invitee on the appellants' property, the court looked to the Restatement (Second) of Torts to define a landowners' duty to an invitee:

A possessor of land is subject to liability for physical harm caused by his invitees by a condition of the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.²¹⁸

The homeowners' association argued that there was no evidence that it had

210. *Id.* at 924.

211. *Id.*

212. *Id.* at 925.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 926 (citing *Douglass v. Irvin*, 549 N.E.2d 368, 369 (Ind. 1990)).

218. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 343 (1965)).

installed or placed the multi-box mailbox on the wall at the condominium.²¹⁹ Further, the homeowners' association argued that Parsons failed to show that the defendants had notice of a hidden defect that they should have warned Parsons of or taken steps to correct.²²⁰ In its analysis, the court noted that the homeowners' association had never received any complaints about the security of the multi-box mailboxes such that would have prompted it to test the strength of the units' attachment to the wall.²²¹ The court next noted that there was no evidence that the homeowners' association had installed the multi-box mailboxes.²²² In sum, "there was no evidence that the Appellants were aware of how the multi-box mailboxes were attached to the wall, i.e. whether the screws were attached to the studs, or to the drywall."²²³

Finally, the court observed that a landowner's duty of care is a known or should have known standard.²²⁴ Finding that the record was devoid of any evidence that the homeowners' association knew or should have known about the defect that allegedly caused Parsons' injuries, the court observed that there was "a complete failure of proof on at least one essential element of Parsons' case."²²⁵ Accordingly, the court concluded that the trial court erred in denying the appellants' motions for judgment on the evidence.²²⁶

III. WRONGFUL DEATH

In *Bolin v. Wingert*,²²⁷ the Indiana Supreme Court addressed an issue of first impression under Indiana's Child Wrongful Death Statute: "[w]hether an eight-to ten-week-old fetus fits the definition of 'child.'"²²⁸ In their complaint, the Bolins alleged that Wingert caused Mrs. Bolin's miscarriage and requested compensation for the wrongful death of their unborn child.²²⁹ In response, Wingert moved for partial summary judgment, alleging that the Child Wrongful Death Statute did not provide for such a recovery.²³⁰ The trial court granted the motion. The Bolins appealed, and the court of appeals held "that the term 'child' was not expressly defined by the legislature. In relying upon *Britt v. Sears*,²³¹ the court held that only 'an unborn viable child' had a claim under the Wrongful

219. *Id.* at 926.

220. *Id.*

221. *Id.* at 928.

222. *Id.*

223. *Id.*

224. *Id.* at 929 (citing *Burrell v. Meads*, 569 N.E.2d 637, 640 (Ind. 1991)).

225. *Id.*

226. *Id.*

227. 764 N.E.2d 201 (Ind. 2002).

228. *Id.* at 203.

229. *Id.*

230. *Id.*

231. 277 N.E.2d 20 (Ind. App. 1972).

Death Statute.”²³² The court of appeals affirmed the trial court’s grant of partial summary judgment because the Bolins had not produced any evidence that their unborn child was “capable of independent life.”²³³

In an opinion by Chief Justice Shepard, the supreme court concluded that an eight- to ten-week-old fetus did not fit into the definition of ‘child’ in Indiana’s Child Wrongful Death Statute.²³⁴ In reaching this conclusion, the supreme court looked at the Child Wrongful Death Statute which states, “An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child.”²³⁵ The Child Wrongful Death Statute defines child: “As used in this section, ‘child’ means an unmarried individual without dependents who is: (1) less than twenty (20) years of age; or (2) less than twenty-three (23) years of age and is enrolled in an institution of higher education or in a vocational school or program.”²³⁶ The statute allows parents to recover damages for the loss of the child’s services, love, and companionship, as well as expenses such as hospital bills and funeral costs resulting from the child’s death.²³⁷

In interpreting who will fall within the statute’s provisions, the supreme court recognized that courts have generally resolved this question in one of four ways: (1) permit recovery only for the death of children “born alive,” (2) permit recovery only for the death of “viable” unborn children, (3) permit recovery for the death of unborn children that are “quick,” and (4) permit recovery for the death of any unborn child.²³⁸

The supreme court noted that ten states adhere to the “born alive” rule which requires that the injured child be born alive before recovery is permitted.²³⁹ The predominant rule, the rule followed by more than thirty states, is the viability rule. “A fetus is viable when it is ‘so far formed and developed that if then born it would be capable of living.’”²⁴⁰ The “quick” standard is followed only by Georgia and states that “[a] child is considered ‘quick’ when the fetus ‘is able to move in its mother’s womb.’”²⁴¹ The supreme court noted that West Virginia was the only state that allowed recovery for non-viable fetuses without express language from the legislature that “unborn children” are included in the state’s wrongful death statute.²⁴²

After considering these four options, the supreme court focused on the express language of Indiana’s Child Wrongful Death Statute. The supreme court

232. 764 N.E.2d at 203.

233. *Id.*

234. *Id.*

235. *Id.* at 204 (citing IND. CODE ANN. § 34-1-1-8(b) (West 1996)).

236. *Id.* (citing IND. CODE ANN. § 34-1-1-8(a) (West 1996)).

237. *Id.* (citing IND. CODE ANN. § 34-1-1-8(e) (West 1996)).

238. *Id.* at 205.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

observed that the “definition in the statute contains four concepts: an (1) unmarried, (2) individual, (3) without dependents, (4) who is less than twenty years of age.”²⁴³ In analyzing these four concepts, the supreme court went on to say that the first three concepts tend to indicate the legislature contemplated that only living children would fall within the definition of ‘child.’ ‘Unmarried’ and ‘without dependents’ involve activities in which only living persons engage. While very young children cannot marry or have dependents, the vocabulary suggests a desire to define persons who have been born. It would strain this rather express language to read ‘unmarried individual without dependents’ to encompass an unborn child. . . .”²⁴⁴

In addition, the supreme court looked at other statutes where the legislature had provided protection for unborn children, such as Indiana Code section 35-42-1-6 which deals with the termination of a human pregnancy and Indiana Code section 35-46-5-1 which deals with the trafficking fetal tissue.²⁴⁵ “From these statutes, the supreme court felt it was apparent that the legislature knows how to protect unborn children.”²⁴⁶

The supreme court stated:

The express language of the statute and the fact that it is to be narrowly construed lead us to conclude that the legislature intended that only children born alive fall under Indiana’s Child Wrongful Death Statute. The legislature can certainly expand the scope of protection under the Child Wrongful Death Statute if it so chooses.²⁴⁷

The court went on to say that “[t]he exclusion of unborn children from Indiana’s Child Wrongful Death Statute does not mean that negligently injured expectant mothers have no recourse.”²⁴⁸ The supreme court quoted the Missouri Supreme Court, which said, “[T]he mother has her own action for negligently inflicted injury, in which the circumstances of her pregnancy and miscarriage may be brought out and considered as part of the intangible damages.”²⁴⁹

In *Goleski v. Fritz*,²⁵⁰ the Indiana Supreme Court addressed whether derivative claims under the Medical Malpractice Act survive a spouse’s death and whether a claim for a deceased patient’s medical expenses survive and pass on to their estate.²⁵¹ Lawrence Vetter was treated by defendant physicians and subsequently died the following day.²⁵² Dorothy Vetter, Lawrence’s wife, filed

243. *Id.* at 206.

244. *Id.*

245. *Id.* at 207.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* (quoting *Rambo v. Lawson*, 799 S.W.2d 62, 63 (Mo. 1990), superseded by statute as stated in *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995)).

250. 768 N.E.2d 889 (Ind. 2002).

251. *Id.*

252. *Id.* at 890.

a claim with the Indiana Department of Insurance seeking damages from the hospital and the physicians for lost "financial support, love, affections, kindness, attention and companionship" as well as reasonable funeral, burial, and medical expenses.²⁵³ Dorothy died before the claim review process was completed and Nadine Goleski, the couple's daughter, was appointed as personal representative of Dorothy's estate.²⁵⁴ An amended malpractice claim was filed, contending that Dorothy's claim survived Dorothy's death and passed to Dorothy's estate.²⁵⁵

The trial court granted summary judgment for the defendants, holding that Goleski could not maintain an action under any of the three theories.²⁵⁶ The court said that Goleski had no cause under the Wrongful Death Act because she was not the personal representative of Lawrence's estate.²⁵⁷ The court further noted that Goleski could not claim under the Medical Malpractice Act because she was not Lawrence's "representative" as that term appears in the statute.²⁵⁸ Finally, the trial court said that the Survival Statute did not help Goleski because she was not the personal representative of Lawrence's estate and was not alleging that something other than the defendant's negligence caused Lawrence's death.²⁵⁹ The court of appeals affirmed the decision.²⁶⁰

On transfer, the Indiana Supreme Court held that since a personal representative was not timely appointed within the two-year period, there was not an action under the Wrongful Death Statute.²⁶¹ Further, the supreme court also held that "claims made by a patient's 'representative' under the Medical Malpractice Act survive the death of the representative and pass to the representative's estate."²⁶² Finally, the supreme court held that "[d]erivative claims for medical malpractice such as a claim by a spouse for loss of consortium generally survive the death of the claimant under the Survival Statute."²⁶³

In *Estate of Sears v. Griffin*,²⁶⁴ the Indiana Supreme Court addressed the issue of whether there was a genuine issue of material fact in a motion for summary judgment that the sister, Elizabeth, was dependent on her deceased brother, Evan.²⁶⁵ The Defendant's, Griffin, automobile struck Evan as he was installing a traffic counting strip in a roadway and he died from the resulting head injuries.²⁶⁶ Evan's parents signed a release discharging Griffin from all claims

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 890-91.

262. *Id.* at 889-90.

263. *Id.* at 890.

264. 771 N.E.2d 1136 (Ind. 2002).

265. *Id.* at 1137.

266. *Id.*

arising from the accident in exchange for the limit on Griffin's liability insurance policy.²⁶⁷ After signing the release, Evan's mother sued Griffin as administratrix of Evan's estate and as next friend of her daughter, Elizabeth, who was twelve when the release was signed.²⁶⁸ "Griffin moved for dismissal of the claims, arguing that the Sears were entitled to only one remedy, which they had received, and that Elizabeth could only make a claim through Evan's estate."²⁶⁹

The trial court granted Griffin's motion to dismiss all the claims.²⁷⁰ Treating the ruling as a grant of summary judgment, the court of appeals reversed on the wrongful death claims and Judge Baker concluded that he would affirm the trial court on all claims.²⁷¹ The supreme court held that the estate's survival claim had no merit because Evan undisputedly died of the injuries suffered when struck by Griffin's car, and the statute requires the person to die from causes *other than* those personal injuries sustained in the wrongful act or omission.²⁷² Furthermore, the supreme court held that only a personal representative can bring an action under the Wrongful Death Statute and that Evan's mother as next friend to Elizabeth lacked standing to bring such a claim.²⁷³

In analyzing the wrongful death claims, the supreme court did note that "the question whether Elizabeth qualified as a dependent is important in evaluating the estate's wrongful death claim because the determination of which statute applies (Wrongful Death Statute or Child Wrongful Death Statute) turns on whether Evan died 'without dependents.'"²⁷⁴ "The person claiming dependence must, however, 'show a need or necessity for support . . . coupled with the contribution to such support by the deceased.'"²⁷⁵ "Pecuniary loss is the foundation of the wrongful death action. This loss can be determined in part from the assistance that the decedent would have provided through money, services or other material benefits."²⁷⁶ Concerning this loss, the court stated, "Although the record is not yet developed, it would be quite unusual for a twelve-year-old with both parents living to be dependent on her teen-age sibling for services and/or financial support that the parents could not or would not provide in that sibling's absence."²⁷⁷

The court then began to define the parameter of services, stating that services must go beyond merely helping other family members, even those who have relied on such assistance.²⁷⁸ Further, "[t]he support must also be more than just

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* (emphasis added by court).

273. *Id.* at 1138.

274. *Id.* at 1138-39.

275. *Id.* at 1139 (quoting *N.Y. Cent. R. Co. v. Johnson*, 127 N.E.2d 603, 607 (Ind. 1955)).

276. *Id.* (quoting *Luider v. Skaggs*, 693 N.E.2d 593, 596-97 (Ind. Ct. App. 1998)).

277. *Id.*

278. *Id.* (citing *Chamberlain v. Parks*, 692 N.E.2d 1380, 1381, 1384-85 (Ind. Ct. App. 1998)).

a service or benefit to which the claimed dependent had become accustomed.”²⁷⁹ The court also was unable to find any cases establishing dependency for purposes of the Wrongful Death Statute based purely on emotional support, or on financial support and/or services that parents were capable of providing and would be obligated to provide in the absence of deceased sibling.²⁸⁰ The court stated that “[u]nless more than this is proven on remand, Evan died without legal dependents and recovery for his wrongful death lies under the Child Wrongful Death Statute, not the Wrongful Death Statute.”²⁸¹

The Indiana Supreme Court reversed on the estate’s wrongful death claim and remanded for a determination of whether Elizabeth was Evan’s legal dependent.

IV. UNDERINSURED MOTORIST

In *Corr v. American Family Insurance*,²⁸² the Indiana Supreme Court addressed whether a vehicle is an underinsured motor vehicle pursuant to section 27-7-5-4(b) of the Indiana Code if the amount actually available for payment to the insured from the tortfeasor’s bodily injury liability policies is less than the policy limits of the insured’s underinsured motorist coverage. The Corrs’ fifteen-year-old daughter, Janel, was killed in a single-vehicle accident in which several other people were injured. The owner of the vehicle, Balderas, had two separate policies in effect. Each policy had \$100,000 per person, \$300,000 per occurrence limits.²⁸³ Pursuant to mediation, the parties to the lawsuit agreed that “Janel’s parents, who were divorced, would each receive \$57,500.”²⁸⁴

The Corrs each had insurance policies through American Family Insurance (“AFI”) that provided underinsured motorist coverage (“UIM”) with limits of \$100,000 per person and \$300,000 per occurrence.²⁸⁵ The Corrs maintained that since all that was available was \$57,500, the responsible party was

The Court found these services [helping mother in and out of chairs, driving her to doctor appointments, carrying groceries, helping with lawn care and snow removal, and other household tasks] not sufficiently “tangible and material” to establish the parent’s dependence; they “amounted to no more than gifts, donations and acts of generosity expected of a son to whom free housing, most of his board, gasoline money and automobile insurance was provided.”

Id.

279. *Id.* (citing *Wolf v. Boren*, 685 N.E.2d 86, 87 (Ind. Ct. App. 1997) (“Although ‘[i]n general a general sense, [decedent’s] family was depending on [decedent] to provide his vacation home as a family retreat,’ the Court declined to extend coverage of the Wrongful Death Statute that far.”)).

280. *Id.* at 1140.

281. *Id.*

282. 767 N.E.2d 535 (Ind. 2002).

283. *Id.* at 537.

284. *Id.*

285. *Id.*

underinsured.²⁸⁶ AFI argued that since the responsible party's coverage was identical to the claimants, Balderas' vehicle was not underinsured.²⁸⁷ Accordingly, AFI denied the parents' claims for Janel's death under each party's respective UIM coverage.²⁸⁸

The Corrs sued AFI and the trial court granted summary judgment in AFI's favor "on the ground that the Balderas van was not underinsured."²⁸⁹ The trial court's decision was affirmed by the court of appeals.²⁹⁰

On transfer, the supreme court first reviewed the statutory definition of underinsured motor vehicle. Section 27-7-5-4(b) of the Indiana Code provides:

For the purpose of this chapter, the term underinsured motor vehicle, subject to the terms and conditions of such coverage, includes an insured motor vehicle where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits for the insured's underinsured motorist coverage at the time of the accident, but does not include an uninsured motor vehicle as defined in subsection (a).²⁹¹

AFI argued that the statute requires a

comparison of the \$600,000 per accident bodily injury liability limits provided by the two Balderas policies to the \$300,000 per accident UIM limit under either James' or Pamela's policy. Under this comparison, AFI contends that the van was not underinsured because the aggregate limits of Balderas' bodily injury liability coverage exceeded the limit of either James or Pamela Corr's UIM coverage.²⁹²

In other words, AFI posited that the proper consideration was of the per accident limits rather than the per person limits. In rejecting this proposal, the court stated that "if a limits-to-limits comparison is to be employed, where only one insured is injured in an accident, the appropriate limits to compare to determine if a vehicle is underinsured are the per person limit of the tortfeasor's liability policy and the per person limit of the insured's UIM policy."²⁹³ The court arrived at this conclusion based upon section 27-7-5-5(c) of the Indiana Code, which states that the "maximum amount payable for bodily injury under [UIM] coverage is the lesser of: (1) the difference between: (A) the amount paid in damages to the insured by [the tortfeasor] and (B) the per person limit of [UIM] coverage [held by the insured,] or (2) the difference between: (A) the total amount of damages

286. *Id.* at 539.

287. *Id.* at 538.

288. *Id.* at 537.

289. *Id.*

290. *Id.*

291. *Id.* at 538 (citing IND. CODE § 27-7-5-4(b) (1998)).

292. *Id.*

293. *Id.*

incurred by the insured; and (B) the amount paid by the tortfeasor.”²⁹⁴

The court next observed that the mediation determined that Balderas’ mother’s policy was an excess policy above and beyond Balderas’ father’s policy; thus, the aggregate per person coverage under both policies was \$200,000.²⁹⁵ Although the amount of James Corr’s UIM coverage was in dispute, the court did not consider this issue.²⁹⁶ Instead, the court noted that the amount actually recovered by James and Pamela Corr was \$57,500 each, or a total of \$115,000.²⁹⁷ Therefore, the court concluded that “the issue is whether we are to compare the Balderas policy limits (\$200,000) or the amount recovered (\$57,500) to the amount of each Corr’s UIM coverage.”²⁹⁸

AFI urged the court to follow the holding in an Indiana opinion that looked to Colorado case law in deducing that a policy limits to policy limits comparison was mandated in Indiana.²⁹⁹ The Corrs, however, submitted that the appropriate comparison is

between the amount of each Corr’s UIM coverage and the amount of coverage limits actually “available for payment” to each Corr from Balderas’ coverage. Under that comparison, the Corrs argue, the van is underinsured because the amount available for payment to each Corr (\$57,500) is less than the limit of each Corr’s UIM coverage (\$100,000 for Pamela, and either \$100,000 or \$250,000 for James).³⁰⁰

In its consideration of the parties’ positions, the court first rejected AFI’s contention that the reasoning in *Allstate v. Sanders* was instructive.³⁰¹ The Colorado statute relied upon in *Sanders* was not the same as Indiana’s UIM statute.³⁰² Unlike the Colorado statute in *Sanders*, “Indiana’s UIM statute does not express [a] clear preference for a limits-to-limits comparison” but instead “turns on the amount of the ‘coverage limits available for payment to the insured.’”³⁰³

The court next noted that a cardinal rule of statutory construction in Indiana: “[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense.”³⁰⁴ Accordingly, the court determined the phrase “available for payment to the insured” meant money that is “present or ready for immediate use by the insured, not amounts potentially accessible. Under this view, the amount

294. IND. CODE § 27-7-5-5(c) (2002).

295. *Corr*, 767 N.E.2d at 538.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* (citing *Allstate v. Sanders*, 644 N.E.2d 884 (Ind. Ct. App. 1994) (citing *Leetz v. Amica Mut. Ins. Co.*, 839 P.2d 511 (Colo. Ct. App. 1992))).

300. *Id.* at 538-39.

301. *Id.* at 539.

302. *Id.*

303. *Id.*

304. *Id.* (citing IND. CODE § 1-1-4-1(1)(2000)).

‘available’ is the \$57,500 each Corr actually recovered, not the \$200,000 theoretically available from the Balderas. Moreover, if the term ‘available for payment’ did not achieve this result, it would apparently be wholly surplusage, contrary to standard principles of statutory construction.”³⁰⁵

In reversing the trial court, Justice Boehm noted that “[o]ur holding today is also congruent with the underlying purpose of UIM coverage, which broadly stated is to give the insured the recovery he or she would have received if the underinsured motorist had maintained an adequate policy of liability insurance.”³⁰⁶ Further, the court opined that AFI’s position “leads to the anomalous result that when multiple people are injured in an accident, an injured party is in a better position if the driver responsible for the accident is not insured at all than if he or she has insurance.”³⁰⁷

Finally, the court rejected AFI’s argument that the language of its policy mandates a limits-to-limits comparison based on the fact that Indiana does not permit insurers to offer less coverage than the law requires.³⁰⁸ By unanimous opinion, the supreme court found that the Balderas’ van was underinsured; therefore, the trial court erred in granting summary judgment in AFI’s favor.³⁰⁹

V. DAMAGES

A. Punitive Damages

In *Cheatham v. Pohle*,³¹⁰ the court of appeals considered whether the allotment of 75% of punitive damage awards to the State of Indiana’s victim compensation fund, pursuant to section 34-51-3-6 of the Indiana Code, is an unconstitutional taking of the prevailing party’s property under the United States and Indiana Constitutions. The court also addressed whether the same statute violates article 1, section 21 of the Indiana Constitution because it is an unconstitutional demand on the prevailing party’s attorney without just compensation.

Doris Cheatham sued her former husband, Michael Pohle, for invasion of privacy and intentional infliction of emotional distress after he posted nude photographs of her in various public places.³¹¹ A jury awarded Cheatham \$100,000 in compensatory damages and \$100,000 in punitive damages.³¹²

305. *Id.* at 540 (citing *State ex rel. Hatcher v. Lake Superior Court*, 500 N.E.2d 737, 740 (Ind. 1986); *Ind. Dep’t of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 339 (Ind. 1994) (mere surplusage unacceptable according to ordinary canons of statutory construction)).

306. *Id.* (citing LEE R. RUSS & THOMAS F. SEGELLA, *COUCH ON INSURANCE* 3D § 171:2 (1995)).

307. *Id.* (quoting *Corr v. Shultz*, 743 N.E.2d 1194, 1197 (Ind. Ct. App. 2001)).

308. *Id.* (citing *Corr*, 743 N.E.2d at 1199).

309. *Id.* at 541.

310. 764 N.E.2d 272 (Ind. Ct. App. 2002).

311. *Id.* at 274.

312. *Id.*

The statute that permits the State to take 75% of Cheatham's punitive damage award, reads, in relevant part, as follows:

(a) [W]hen a judgment that includes a punitive damage award is entered in a civil action, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.

(b) Upon receiving the payment described in subsection (a), the clerk of the court shall:

(1) pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and

(2) pay the remaining seventy-five percent (75%) of the punitive damage award to the treasurer of state, who shall deposit the funds into the violent crime victims compensation fund.³¹³

Cheatham asserted that the State's collection of 75% of her punitive damages award was an "unconstitutional taking under the Fourteenth Amendment of the United States Constitution and Article 1, Section 21 of the Indiana Constitution."³¹⁴ The court observed that courts in several states have found no vested property right in punitive damage awards. "Moreover, it is well settled law in Indiana that there is no entitlement to punitive damages That being the case, we decline to hold that the State's appropriation of a portion of a judgment creditor's punitive damages is an unconstitutional 'taking.'"³¹⁵

The court next addressed Cheatham's argument that the State's right "to collect 75% of her punitive damage award, without a corresponding obligation to pay any attorney's fees, unconstitutionally demands the services of her attorney without just compensation."³¹⁶ Cheatham contended that section 34-51-3-6 of the Indiana Code conflicts with article 1, section 21 of the Indiana Constitution, which provides that "[n]o person's particular services shall be demanded, without just compensation"³¹⁷

The court stated that Cheatham must meet a three part test in order to prevail on her particular services claim.³¹⁸ Specifically, based on the test set forth by the Indiana Supreme Court in *Bayh v. Sonnenburg*,³¹⁹ Cheatham must demonstrate that her attorney "(1) performed particular services, (2) on the State's demand, (3) without just compensation."³²⁰

313. IND. CODE § 34-51-3-6 (2002).

314. *Cheatham*, 764 N.E.2d at 276.

315. *Id.* at 277 (citing *Durham ex. rel. Estate of Wade v. U-Haul Int'l*, 745 N.E.2d 755, 764 (Ind. 2001)).

316. *Id.*

317. IND. CONST. art. I, § 21.

318. *Cheatham*, 764 N.E.2d at 277-78.

319. 573 N.E.2d 398 (Ind. 1991).

320. *Cheatham*, 764 N.E.2d at 278. (citing *Sonnenburg*, 573 N.E.2d at 411).

First, the court looked to *Sonnenburg* to determine whether the Cheatham's attorney's services were "particular" as contemplated by article 1, section 21.³²¹ The proper query to determine whether services are "particular" is "(1) whether the services [have] been historically compensated; and (2) whether the service was something required of a party as an individual, in contradistinction to what is required, generally, of all citizens."³²² The court found that "at least since 1853, our supreme court has recognized that attorneys have a right to be compensated for services different from those that are required of ordinary citizens We conclude, and it is well settled, that attorneys perform 'particular services' within the meaning of Article 1, Section 21."³²³

The court next examined the question of whether Cheatham's attorney performed services "on demand" from the State.³²⁴ The court observed that "[t]he essence of a demand, as opposed to a mere request, for one's services encompasses 'the use or threatened use of physical force or legal process which creates in the citizen a reasonable belief that he is not free to refuse the request.'"³²⁵ Because the State effectively compels attorneys to forfeit their right to collect fees on 75% of a punitive damage award pursuant to section 34-51-3-6 of the Indiana Code, the court deduced that Cheatham's lawyer "provided legal services on demand from the State."³²⁶ "In other words, this statute presents a threat of legal process against all attorneys who fail to surrender to the State their right to collect fees and costs from 75% of a punitive damage award."³²⁷

Finally, the court considered the final prong of the *Sonnenburg* analysis to ascertain whether section 34-51-3-6 of the Indiana Code mandates withholding just compensation from attorneys who win punitive damage awards for their clients.³²⁸ The court noted that the constitutional question is whether the statute "allows the State to exploit an attorney's particular legal services without paying for them."³²⁹ The court further observed that "[a]s drafted, the statute not only forces the winning party to surrender 75% of its award, but prevents that party's attorney from recovering fees and costs from that portion of the award while allowing the State to benefit from successful legal representation without having to pay any remuneration or expenses."³³⁰ Continuing, the court stated

the statute as written presents an interesting ethical dilemma for attorneys. If the State is not required to pay the prevailing party's attorney's fees, as it relates to the State's share of the punitive damages

321. *Id.* (citing *Sonnenburg*, 573 N.E.2d at 413-14).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 279 (citing *Sonnenburg*, 573 N.E.2d at 417).

326. *Id.*

327. *Id.*

328. *Id.* at 279-80.

329. *Id.* at 280.

330. *Id.* at 280-82.

award, what incentive to attorneys have to then seek such damages for their clients, even in cases where punitive damages might be warranted?³³¹

The court surmised that Cheatham demonstrated that her attorney was not justly compensated under the statute; accordingly, the third prong of the *Sonnenburg* test was met.³³² As such, the court held that "Indiana Code Section 34-51-3-6 violates Article 1, Section 21 of the Indiana Constitution and is void on its face as matter of law to the extent that it requires attorneys to perform, upon demand from the State, particular services without just compensation."³³³

B. Negligent Infliction of Emotional Distress

In *Blackwell v. Dykes Funeral Homes, Inc.*,³³⁴ the court of appeals addressed the scope of the impact rule as it applies to claims for the negligent infliction of emotional distress. After Phil Blackwell's suicide, his family arranged for him to be cremated by Dykes Funeral Home and entombed by Graceland Cemetery's Chapel of Peace in a glass niche. Several years after Phil Blackwell's urn was entombed, his parents learned that his remains were not in the glass niche and were, in fact, lost. The Blackwells brought suit against Dykes and Graceland for breach of contract and intention and negligent infliction of emotional distress.³³⁵

The trial court granted the defendants' motions for summary judgment on the intentional and negligent infliction of emotional distress claims. The trial court also granted summary judgment in favor of the defendants on the plaintiffs' request for punitive damages on their breach of contract claim. On appeal, the Blackwells asserted that the trial court erred when it granted summary judgment in favor of the defendants on the Blackwells' claim for negligent infliction of emotional distress.³³⁶

In addressing the Blackwells' appeal, the court examined the erosion of the traditional impact rule in Indiana throughout the last decade. Specifically, the court discussed Indiana's modified impact rule as applied by the Indiana Supreme Court in the *Shuamber*, *Groves* and *Bader* opinions.³³⁷ The court recognized that, under the modified impact rule, Indiana allows claims for negligent infliction of emotional distress resulting from a physical injury that has occurred to another person.³³⁸ The court noted:

331. *Id.* at 281 n.8.

332. *Id.* at 282.

333. *Id.*

334. 771 N.E.2d 692 (Ind. Ct. App. 2002).

335. *Id.* at 694.

336. *Id.* at 695.

337. *See id.* at 695-96 (citing *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991); *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000); *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000)).

338. *See id.* at 696 (citing *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991); *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000); *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000)).

[T]he Blackwells, as bystanders, claim that they suffered emotional distress that resulted from the alleged negligent conduct that involved a close relative's remains. . . . While there was no physical impact, the Blackwells have alleged serious emotional trauma and it is of a kind that a reasonable person would experience.

In our view, this is the type of claim . . . where the plaintiff is sufficiently and directly involved in the incident giving rise to the emotional trauma. . . . We are satisfied that the evidence designated to the trial court in this case is such that the alleged mental anguish suffered by the Blackwells is not likely speculative, exaggerated, fictitious, or unforeseeable. . . . Provided they can prevail on their negligence claim, we see no reason why the Blackwells should not be able to claim damages for emotional distress.³³⁹

Accordingly, the court found that the trial court erred in granting summary judgment in Dykes' favor. However, the court affirmed the trial court's grant of summary judgment in Graceland's favor based upon the court's finding that the Blackwells failed to provide any evidence demonstrating that Graceland ever took possession of the urn.³⁴⁰

C. Zero Verdict

In *Neher v. Hobbs*,³⁴¹ the Indiana Supreme Court considered whether, in a matter where liability is admitted or clear, a case may be remanded for a new trial solely on the issue of damages. At the trial of this personal injury case, the jury returned a verdict in favor of plaintiff/husband Gary Hobbs but awarded him zero damages.³⁴² The jury found for the defendant on Mrs. Hobbs' loss of consortium claim. The trial court granted the plaintiffs' motion to correct errors and ordered a new trial.³⁴³ The court of appeals reversed the trial court and ordered the verdict reinstated.³⁴⁴

On transfer, the supreme court considered Neher's position that "the trial court failed to supply sufficient findings of fact pursuant to Indiana Trial Rule 59(J)(7)" and abused its discretion as the "thirteenth juror."³⁴⁵ Additionally, the court considered a cross-appeal by the plaintiffs asserting that the trial court erred in failing to limit the new trial to the issue of damages only.³⁴⁶

With regard to Neher's argument that the trial court failed to comply with

339. *Id.* at 697 (citation omitted).

340. *See id.*

341. 760 N.E.2d 602 (Ind. 2002).

342. *Id.* at 604.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

Trial Rule 59(J)(7), the court countered that “[w]hen, as here, a trial court grants a new trial on grounds that the verdict is *clearly erroneous* rather than because it is *against the weight* of the evidence, the findings need not set forth the supporting and opposing evidence.”³⁴⁷ Further, the court noted:

In the present case, the trial court’s findings provide adequate explanation as to why the trial court ordered a new trial rather than entering a judgment on the evidence. The court did not take issue with the jury’s determination that the defendant was at fault for the collision, but only with the jury’s failure to award damages to plaintiff Gregory Hobbs and to award a judgment for plaintiff Emma Hobbs. While finding that these aspects of the jury’s verdicts clearly erroneous as contrary to the evidence, the trial court could not, on this basis, affirmatively determine the proper amount of damages and enter a final judgment accordingly. From the trial court’s findings, it is clear why it ordered a new trial rather than entering a judgment on the evidence. We therefore reject the defendant’s claims that the trial court’s findings failed to comply with the procedural requirements of Trial Rule 59(J).³⁴⁸

The court next addressed Neher’s contention that the trial court abused its discretion as a thirteenth juror in setting aside the jury’s verdict.³⁴⁹ Noting that “[a] trial court’s authority to act under the ‘thirteenth juror’ principle refers to its power to grant a new trial if it determines that the verdict is ‘against the weight of the evidence’ pursuant to Trial Rule 59,” the court again recognized that the trial court’s “new trial order was not based upon its weighing of the evidence but upon its finding that the verdicts were clearly erroneous as contrary to the evidence.”³⁵⁰ Relying upon the parties’ stipulation to Mr. Hobbs’ medical expenses and compensation for his partial permanent impairment (PPI) rating at trial, along with comments made by defense counsel in his closing argument, the court deduced that Neher admitted Hobbs sustained medical expenses and impairment as a result of the auto accident.³⁵¹ Therefore, the court determined that the trial court did not abuse its discretion when it ordered a new trial upon its finding that the jury’s verdict was clearly erroneous.³⁵²

Finally, the court agreed with Hobbs that, pursuant to Trial Rule 59(J), the new trial should be limited to two issues: “(a) the amount of damages to be awarded to plaintiff Gregory D. Hobbs, and (b) whether the plaintiff Emma J. Hobbs is entitled to a judgment in her favor and, if so, the amount of any

347. *Id.* at 606 (citing IND. T.R. 59(J); *State v. Kleman*, 503 N.E.2d 895, 896 (Ind. 1987); *Karl v. Stein*, 749 N.E.2d 71, 78 (Ind. Ct. App. 2001); *Keith v. Mendus*, 661 N.E.2d 26, 32 (Ind. Ct. App. 1996)) (emphasis supplied by the court).

348. *Id.*

349. *See id.* at 606-07.

350. *Id.* at 607 (citing *State v. Kleman*, 503 N.E.2d 895, 896 (Ind. 1987)).

351. *See id.*

352. *See id.* at 607-08.

damages.”³⁵³

In *Russell v. Neumann-Steadman*,³⁵⁴ the court of appeals addressed the trial court’s role in granting additur in an instance where there is a plaintiff-favorable verdict and evidence of damages, yet the jury has failed to award damages. Russell’s vehicle rear-ended Neumann-Steadman (“Steadman”) while the vehicles were in line at a car wash.³⁵⁵ Steadman incurred \$2100 in medical expenses.³⁵⁶

“At trial, Russell admitted that she was at fault for the collision, and that Steadman could not have avoided it.”³⁵⁷ Steadman’s physician testified that her injuries were caused by the accident and Russell failed to call a medical expert to refute this testimony.³⁵⁸ Despite the evidence presented at trial and its finding in favor of Steadman, the jury awarded zero damages to Steadman.³⁵⁹ Steadman then filed a Motion to Correct Error and Request for Additur.³⁶⁰ The trial court found the jury’s award to be inadequate because there was undisputed evidence of Steadman’s medical expenses.³⁶¹ However, the trial court not only awarded \$2100 for medical expenses, it “also awarded an additional \$4200, presumably for pain and suffering.”³⁶²

The court of appeals noted that Trial Rule 59(J) “empowers the trial court to enter a final judgment fixing damages only when the evidence on the amount of damages is clear and un rebutted.”³⁶³ Moreover, “[d]amage awards for pain and suffering are particularly within the province of the jury because they involve the weighing of evidence and credibility of witnesses.”³⁶⁴ Here, the court of appeals found that the trial court’s award of \$4200 above and beyond the amount of undisputed medical expenses, presumably for pain and suffering, invaded the jury’s province.³⁶⁵ Hence, the court held that the trial court abused its discretion.

Accordingly, the court reversed the trial court’s judgment and remanded the matter for a new trial on the issue of damages.³⁶⁶

353. *Id.* at 608.

354. 759 N.E.2d 234 (Ind. Ct. App. 2001).

355. *See id.* at 236.

356. *See id.* at 238.

357. *Id.* at 236.

358. *See id.* at 237.

359. *See id.* at 236.

360. *Id.*

361. *Id.*

362. *Id.* at 238.

363. *Id.* (quoting *Sherman v. Kluba*, 734 N.E.2d 701, 704 (Ind. Ct. App. 2000), *trans. denied* (quoting *Amos v. Keplinger*, 397 N.E.2d 1010, 1011 (Ind. App. 1979))).

364. *Id.* (citing *Ritter v. Stanton*, 745 N.E.2d 828, 845 (Ind. Ct. App. 2001)).

365. *See id.*

366. *Id.*

VI. STATUTE OF LIMITATIONS

In *Ray-Hayes v. Heinemann*,³⁶⁷ the Indiana Supreme Court, in a per curiam decision, addressed "whether a civil action is timely commenced if the plaintiff files a complaint within the applicable statute of limitations but does not tender the summons to the clerk within that statutory period."³⁶⁸ In resolving this issue, the supreme court was also resolving a conflict between the court of appeals opinion in this case,³⁶⁹ and the opinion in *Fort Wayne International Airport v. Wilburn*.³⁷⁰

In *Wilburn*, the court of appeals held that the complaint was not timely commenced where the plaintiff tendered the complaint and filing fee to the clerk within the proper statute of limitations, but did not tender the summons to the clerk until after the statute of limitations had expired.³⁷¹ The court in *Wilburn* followed the language in *Boostrom v. Bach*,³⁷² which stated that the statute of limitations continues to run, and is not tolled, where a plaintiff failed to send the filing fee with the complaint which the clerk refused to file.³⁷³ The court described its result in *Boostrom* as "consistent with the modern notion that the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit."³⁷⁴

On the other hand, the court of appeals reached the opposite conclusion in *Ray-Hayes I*.³⁷⁵ In that case, the plaintiff amended her complaint within the two-year statutory period but failed to tender summonses until more than four months after the two-year statutory period.³⁷⁶ The trial court dismissed the claims against the defendant, Nissan.³⁷⁷ The court of appeals held that "because the plaintiff filed her amended complaint within the statute of limitations, she commenced her claims against Nissan timely and dismissal was error."³⁷⁸

In a narrow 3-2 majority, the Indiana Supreme Court held that the summons are required to be tendered within the statute of limitations period.³⁷⁹ The court also said that "[r]equiring that the summons be tendered within the statute of limitations is also good policy because it promotes prompt, formal notice to defendants that a lawsuit has been filed."³⁸⁰ Moreover, the supreme court stated

367. 760 N.E.2d 172 (Ind. 2002) (*Ray-Hayes II*).

368. *Id.* at 173.

369. 743 N.E.2d 777 (Ind. Ct. App. 2001) (*Ray-Hayes I*).

370. 723 N.E.2d 967 (Ind. Ct. App. 2000).

371. *See id.*

372. 622 N.E.2d 175 (Ind. 1993), *cert. denied*, 513 U.S. 928 (1994).

373. *Ray-Hayes II*, 760 N.E.2d at 173 (quoting *Boostrom*, 622 N.E.2d at 175).

374. *Id.* at 173-74 (quoting *Boostrom*, 622 N.E.2d at 177).

375. *Id.* at 174.

376. *See id.*

377. *See id.*

378. *Id.*

379. *Id.*

380. *Id.*

that its approval of *Wilburn* coincided with recent amendments to the Indiana Trial Rules.³⁸¹ Indiana Trial Rule 3 became effective April 1, 2002, and states:

A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.³⁸²

The Indiana Supreme Court vacated the court of appeals opinion in *Ray-Hayes I* and affirmed the trial court's dismissal of the claims against Nissan.

In *Ray-Hayes v. Heinemann*,³⁸³ the Indiana Supreme Court revisited the case and addressed the issue of whether to apply the previous decision only prospectively.³⁸⁴ In *Bayh v. Sonnenburg*,³⁸⁵ the Indiana Supreme Court followed "the three-prong test employed by the United States Supreme Court to determine when to follow the unusual course of applying a decision prospectively."³⁸⁶ The first prong states that "the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."³⁸⁷ The second prong requires the court to "look at the purpose and effect of the rule, and whether retrospective operation will further or retard its operation."³⁸⁸ The final prong requires the court to "weigh the inequity imposed by retroactive application."³⁸⁹

Concerning the first prong, the supreme court noted that "[s]everal judges on the court of appeals shared the view that service of the summons was not needed to toll the statute of limitations, and [that] it [was] regrettable that former Trial Rule 3 did not explicitly refer to the summons."³⁹⁰ Further, the supreme court's mention of the summons in *Boostrom* came in a footnote.³⁹¹ Under these circumstances, the supreme court thought "the resolution of this issue was arguably a surprise" and was not "clearly foreshadowed."³⁹² In regards to the second prong, the supreme court considered it only "marginally relevant."³⁹³ The supreme court believed the third prong warranted giving relief to *Ray-Hayes* because the "[d]ismissal of her complaint as a result of her understanding of the

381. *See id.*

382. *Id.* at 174-75.

383. 768 N.E.2d 899 (Ind. 2002) (*Ray-Hayes III*).

384. *Id.* at 900.

385. 573 N.E.2d 398 (Ind. 1991).

386. *Ray-Hayes III*, 768 N.E.2d at 900.

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* at 901.

391. *Id.*

392. *Id.*

393. *Id.*

rule, which was shared by some respected authorities on Indiana law, [was] a particularly harsh result.”³⁹⁴ The supreme court said:

Prospective application in this case [was] a product of its very specific circumstances: the diversity of opinion among legal experts as to the proper application of [Indiana] Trial Rule 3 when Ray-Hayes’ complaint was filed, that retrospective application of [their] decision to Ray-Hayes’ case [would] not further that holding’s operation, the harsh result of dismissal, and the apparent lack of prejudice to the opposing parties from delay in the services of summonses.³⁹⁵

The Indiana Supreme Court granted Ray-Hayes’ petition for rehearing, vacated the trial court’s dismissal of her action against Nissan for failure to tender summonses before the statute of limitations expired, and remanded for further proceedings, “including an opportunity for the defendants to renew their motions to dismiss if they can establish a material detriment in the presentation of their case or otherwise occurring as a result of the delay in issuance of summons and notification to them that a claim had been asserted.”³⁹⁶

In *Young v. Tri-Etch, Inc.*,³⁹⁷ the court of appeals addressed the issue of “whether the trial court erred in determining that a liability limitation in the service contract between Tri-Etch and Muncie Liquors applied to the estate’s claim against Tri-Etch.”³⁹⁸ Muncie Liquors purchased a security system and contracted for alarm monitoring services from Tri-Etch.³⁹⁹ Tri-Etch provided an additional service which was that if the store’s alarm was not set within a certain amount of time after the usual closing time, Tri-Etch would call the store, notify the general manager, and then call the police.⁴⁰⁰ On August 12, 1997, the store was robbed and the employee was kidnapped, severely beaten, and left tied to a tree in a nearby park.⁴⁰¹ Tri-Etch, based on its additional service, did not contact the general manager until 3:00 AM, on August 13, 1997, which led the estate to file its complaint on August 6, 1999, because Tri-Etch failed to notify the store of the alarm not being set by 12:30 AM.⁴⁰² Tri-Etch filed a motion for summary judgment that requested the court enter judgment in its favor for the reason that under the terms of the service contract between Muncie Liquors and Tri-Etch, any action against Tri-Etch must have been brought within one year of the incident giving rise to the cause of action.⁴⁰³

The trial court’s decision was based on the opinion in *Orkin Exterminating*

394. *Id.*

395. *Id.*

396. *Id.* at 901-02.

397. 767 N.E.2d 1029 (Ind. Ct. App. 2002) (Young I).

398. *See id.* at 1030.

399. *See id.*

400. *Id.* at 1030-31.

401. *Id.*

402. *Id.* at 1030-31.

403. *Id.* at 1031.

Co. v. Walters,⁴⁰⁴ where that court noted that “Indiana law recognizes that Walters [the plaintiff] had an option of suing in tort or in contract for the negligent performance of a contractual duty. . . . Walters’ suit based in tort does not change the fact that Orkin’s duty to Walters is based on the contract. Moreover, bringing a suit in tort does not allow Walters to avoid the limitation of liability clause in the contract.”⁴⁰⁵

The rationale for *Orkin* court’s rule came from *Better Food Markets, Inc. v. American District Telegraph Co.*:⁴⁰⁶ “Although an action in tort may sometimes be brought for the negligent breach of a contractual duty, . . . still the nature of the duty owed and the consequences of its breach must be determined by reference to the contract which created that duty.”⁴⁰⁷

The estate asserted that “no private contract can be effective in extinguishing or limiting [a party’s] legal liabilities to third persons.”⁴⁰⁸ The estate cited to *CSX Transportation, Inc. v. Kirby*,⁴⁰⁹ where the court noted that “‘a party may not contract against his own negligence’ . . . [so] CSX could not contract away the duty of reasonable care which it owed the Kirbys.”⁴¹⁰

The court of appeals noted that neither *Orkin* nor *CSX Transportation* directly addressed the issue of whether contract liability limits apply to third parties suing in tort, but that the holding in *Orkin* was instructive.⁴¹¹ The court held that “whether the estate brings its claim in contract or tort, it cannot escape the liability limitations in the service contract.”⁴¹² The court also found it unnecessary to determine whether a separate oral contract existed because its genesis in the relationship was established by the written contract.⁴¹³ The court of appeals affirmed the trial court’s grant of summary judgment for Tri-etch.⁴¹⁴

In *Young v. Tri-Etch, Inc.*,⁴¹⁵ the court of appeals revisited the case which was before the court on a petition for rehearing. The estate made two arguments: (1) *Morris v. McDonald’s Corp.*,⁴¹⁶ was binding precedent that conflicted with the court’s decision in *Young I*; and (2) the summary judgment for Tri-etch was contrary to public policy.⁴¹⁷ The court of appeals restated that “Tri-Etch would

404. 466 N.E.2d 55 (Ind. Ct. App. 1984), *trans. denied.*, abrogated on other grounds in *Mitchell v. Mitchell*, 695 N.E.2d 920, 922 (Ind. 1998).

405. *Orkin*, 466 N.E.2d at 58 (citation omitted).

406. 253 P.2d 10, 15-16 (Cal. 1953).

407. *Orkin*, 466 N.E.2d at 58 (citation omitted).

408. *Id.* at 1034.

409. 687 N.E.2d 611 (Ind. Ct. App. 1997).

410. *Id.* at 615 (quoting *Freigy v. Gargaro Co.*, 60 N.E.2d 288, 292 (Ind. 1945) (citations omitted)).

411. *Young I*, 767 N.E.2d at 1034.

412. *Id.*

413. *Id.* at 1035.

414. *Id.*

415. 773 N.E.2d 298 (Ind. Ct. App. 2002) (*Young II*).

416. 650 N.E.2d 1219 (Ind. Ct. App. 1995).

417. *Young II*, 773 N.E.2d at 299.

have had no relationship with Young at all were it not for the service contract between Muncie Liquors and Tri-Etch. Thus, the liability limitations in the contract are controlling over Young's claim against Tri-Etch."⁴¹⁸ In addition, the court stated that they did "not need to reach the question of the existence of duty in this case because any duty that might exist would arise out of the service contract and would thus be bound by contract terms."⁴¹⁹ The court of appeals affirmed its previous opinion in full.⁴²⁰ However, on November 13, 2002, transfer was granted according to Indiana Rule of Appellate Procedure 58(a)⁴²¹ which vacates the court of appeals opinion.⁴²²

VII. BAD FAITH

In *Stoehr v. Yost*,⁴²³ the court of appeals addressed whether the trial court abused its discretion in sanctioning State Farm for acting in bad faith during the mediation process.⁴²⁴ In April 1999, Stoehr's counsel sent a letter to Yost's counsel stating that a mediation would be required before trial under the local rules of court. Because of scheduling issues, the parties failed to perform a timely mediation. Stoehr moved the court for a continuance, which was granted.⁴²⁵ Upon arrival at the scheduled mediation, Stoehr's counsel told the mediator that "based on the facts of the case he did not believe his client was liable, and therefore, he did not intend to offer the Yosts any money."⁴²⁶ "While Stoehr's counsel expressed a willingness to go forward with the mediation and possibly change his position depending on what the Yosts had to say, counsel for the Yosts elected to terminate the mediation upon learning that State Farm would not be making a settlement offer."⁴²⁷

The Yosts filed a Petition for Fees and Costs, claiming that "State Farm acted in bad faith by failing to authorize Stoehr's counsel to settle the case."⁴²⁸ The petition was granted, but the sanctions award was delayed until an evidentiary hearing.⁴²⁹ In the meantime, the case went to trial and ended in a verdict for the defendant.⁴³⁰ During the evidentiary hearing, "Stoehr's counsel requested that the trial court reconsider its prior ruling on the Yosts' petition."⁴³¹ The trial court

418. *Id.*

419. *Id.* at 300.

420. *Id.*

421. IND. R. APP. P. 58(a).

422. 783 N.E.2d 702 (Ind. 2002).

423. 765 N.E.2d 684 (Ind. Ct. App. 2002).

424. *Id.* at 685.

425. *Id.* at 686.

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

granted a hearing de novo where it “found that State Farm had acted in bad faith and ordered Stoehr to pay for the Yosts’ costs and attorney’s fees.”⁴³² Stoehr appealed the trial court’s ruling.⁴³³

On appeal, Stoehr asserted “that the trial court abused its discretion by sanctioning State Farm for meditating in bad faith when the Yosts failed to provide the trial court with evidence that State Farm engaged in conscious wrongdoing for dishonest purposes or that State Farm proposed mediation with surreptitious or malevolent intent.”⁴³⁴ Conversely, the Yosts maintained that State Farm’s “conduct in inducing the Yosts to mediate, when it had no intention of participating, was bad faith.”⁴³⁵ Initially, the court of appeals observed that

a trial court, not present at the mediation, is unlikely to appreciate all that took place there and, as a result, may not understand whether the parties mediated in “good faith.” Moreover, a trial court that equates “good faith” with the fact or amount of settlement offers, or with the success of the parties in reaching resolution, may fail to recognize that sometimes mediation exposes that a case is not “about money,” but rather, is about issues not neatly resolved in a formal legal setting.⁴³⁶

Next the court noted that in *State v. Carter*,⁴³⁷ the court of appeals previously defined “bad faith” in the context of a mediation as follows: “Bad faith amounts to more than bad judgment or negligence; ‘rather it implies the conscious doing of wrong because of dishonest purpose or moral obliquity. . . . It contemplates a state of mind affirmatively operating with furtive design or ill will.’”⁴³⁸ Further, in response to the Yosts’ assertion that State Farm should have objected to mediation, the court found paragraph four of the trial court’s order instructive:

Settlement of the whole case is not the only goal of mediation; “agreement” is another goal, whether it be a factual stipulation, an agreement to forego jury trial in favor of binding arbitration, an identification of issues, a reduction of misunderstandings, a clarification of priorities, or a location of points of agreement. Thus, even where the odds of resolution are slim, mediation can be beneficial because other goals might be achieved.⁴³⁹

The court of appeals concluded that “because mediation is not all ‘about money,’ . . . State Farm’s behavior in suggesting that a mediation be scheduled in accordance with local rules” did not amount to bad faith.⁴⁴⁰ The court of

432. *Id.*

433. *Id.*

434. *Id.* at 686-87.

435. *Id.* at 687.

436. *Id.* (quoting *Gray v. Eggert*, 635 N.W.2d 667, 671 (Wis. Ct. App. 2001)).

437. 658 N.E.2d 618 (Ind. Ct. App. 1995).

438. *Stoehr*, 765 N.E.2d at 687-88 (quoting *Carter*, 658 N.E.2d at 621).

439. *Id.* at 688 (quoting *Carter*, 658 N.E.2d at 623).

440. *Id.* at 689.

appeals noted that State Farm's counsel was willing to listen to what the other side had to say, and depending on what was said, might have been willing to give an offer at that time.⁴⁴¹ The court also concluded that State Farm did have someone present at the mediation with settlement authority because a claims adjuster was present and was in a position to advise State Farm to change its position and settle the matter.⁴⁴² Further, the court found that an attorney is not required "to notify an opposing party of its intention to not offer any dollar amount to settle a case prior to mediation."⁴⁴³ Based on the above findings that State Farm did not act with dishonest purpose or moral obliquity, the court of appeals reversed the judgment of the trial court.⁴⁴⁴

In *Allstate Insurance Co. v. Hammond*,⁴⁴⁵ the court of appeals addressed the following two issues:

1. whether the trial court should have granted [Allstate's] motion to correct error, which sought to reduce the jury's \$160,000 judgment against it to \$51,000, the stipulated amount of uninsured motorist and medical expenses coverage under Hammond's policy; and,
2. whether the trial court erred by instructing the jury that it was to assess damages against Allstate without regard to the policy limits.⁴⁴⁶

Hammond was rear-ended by an uninsured motorist while stopped at an intersection. Allstate and Hammond were unable to agree as to the extent of Hammond's injuries. Hammond sued Allstate alleging that she was its insured at the time of the accident and that the other motorist was uninsured.⁴⁴⁷ The parties stipulated that "Hammond's policy with Allstate provided uninsured motorist coverage of \$50,000, plus \$1,000 in medical expenses coverage."⁴⁴⁸ After closing arguments, the following instruction was given to the jury despite Allstate's objection:

You are instructed that the policy of insurance between Sharon Hammond and Allstate Insurance Company provided uninsured motorist benefits with a policy limit of \$51,000. In assessing damages for the injury suffered by Sharon Hammond, you are to fairly value that injury based on these instructions without regard to the policy limits that were in effect at the time of this collision.⁴⁴⁹

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* at 690.

445. 759 N.E.2d 1162 (Ind. Ct. App. 2001).

446. *Id.* at 1164-65.

447. *Id.*

448. *Id.*

449. *Id.*

The jury returned and the trial court entered a judgment for Hammond. Allstate motioned to correct error, "asserting that it could not be held liable for any amount in excess of the policy limits, \$51,000."⁴⁵⁰ The motion was denied and Allstate appealed.

In its appeal, Allstate relied on *Town & Country Mutual Insurance Co. v. Hunter*,⁴⁵¹ which states "an insurer providing uninsured motorist coverage is liable to its insured for damages caused by the uninsured motorist, but only up to the limits provided for in the insurance policy."⁴⁵² The court concluded that *Hunter* "accurately reflects the general law in Indiana and controls the outcome of this case."⁴⁵³

The court observed that

this case was never tried as a tort action alleging Allstate breached its duty to Hammond of good faith and fair dealing. The complaint made no mention of that type of breach. . . . The jury was not instructed on the requirements of bad faith. . . . The evidence at trial focused entirely on the nature and extent of Hammond's injuries and the extent of her ability to work.⁴⁵⁴

Moreover, the court noted that "Hammond cites no authority to support her assertion that the mere fact the jury returned a verdict in excess of the policy limits is 'prima facie evidence of bad faith.'"⁴⁵⁵ In finding that the action was one claiming breach of contract, the court of appeals stated that "the measure of damages in a contract action is limited to those actually suffered as a result of the breach *which are reasonably assumed to have been within the contemplation of the parties at the time the contract was formed.*"⁴⁵⁶ The court held that

In a first-party action by an insured to collect uninsured motorist benefits from his or her insurer, the amount of recoverable damages cannot exceed the limits provided for in the insurance policy in effect at the time of the accident, in the absence of any claim or evidence that the insurer breached its duty of good faith and fair dealing to its insured.⁴⁵⁷

Having chosen not to pay for a higher amount of uninsured motorist coverage, the court opined that Hammond "cannot now seek to effectively increase her policy limits via a lawsuit in which no evidence of bad faith or

450. *Id.*

451. 472 N.E.2d 1265 (Ind. Ct. App. 1985).

452. *Hammond*, 759 N.E.2d at 1166 (citing *Hunter*, 472 N.E.2d at 1270).

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.* at 1166-67 (quoting *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 519 (Ind. 1993) (emphasis added)).

457. *Id.* at 1167.

unfair dealing on the part of Allstate was introduced."⁴⁵⁸

Hammond further challenges to Allstate's reliance on the uninsured motorist coverage limits in the policy.⁴⁵⁹ Specifically, Hammond asserted that (1) Allstate acted in bad faith by using in-house counsel because of the prohibition against representing two adverse clients; (2) Allstate violated public policy in its handling of uninsured motorist claims; and (3) Allstate's policy was ambiguous and "should be read as waiving the stated policy limits if the insurer and insured failed to settle a claim and the case is tried in a court."⁴⁶⁰ The court rejected Hammond's challenges, concluding that "the trial court misinterpreted the law when it denied Allstate's motion to correct error."⁴⁶¹ It thus abused its discretion in permitting a jury verdict to stand when it exceeded the allowable limit of recoverable damages as provided in Hammond's policy. The court further noted that there was no trial evidence or argument that Allstate had acted in bad faith.⁴⁶²

With regard to the propriety of the jury instruction that directed the jury to disregard the limits of the uninsured policy limits, the court noted that when determining whether error resulted from the giving of an instruction, a three-prong test is to be followed: "(1) whether the tendered instruction correctly states the law; (2) whether there is evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions that are given."⁴⁶³ Further, "[a] jury instruction that misstates the law will serve as grounds for reversal unless the Court on appeal finds that the error was harmless."⁴⁶⁴

Having held that the amount of Hammond's recoverable damages cannot exceed the policy limits, the disputed jury instruction was a misstatement of the law; thereby, Allstate was prejudiced.⁴⁶⁵ The court found that the trial court erroneously instructed the jury as to the amount of permissible damages,⁴⁶⁶ and the court reversed and remanded with instructions to reduce the judgment against Allstate to \$51,000.⁴⁶⁷

VIII. ACCEPTANCE RULE

In *Becker v. Kreilein*,⁴⁶⁸ the Indiana Supreme Court addressed whether the

458. *Id.*

459. *Id.*

460. *Id.* at 1167-68.

461. *Id.* at 1169.

462. *Id.*

463. *Id.* (citing *King v. Clark*, 709 N.E.2d 1043, 1046 (Ind. Ct. App. 1999).

464. *Id.* (citing *Liberty Mut. Ins. Co. v. Blakesley*, 568 N.E.2d 1052, 1058 (Ind. Ct. App. 1991).

465. *Id.* at 1169-70.

466. *Id.* at 1170.

467. *Id.*

468. 770 N.E.2d 315 (Ind. 2002).

owner of property was liable to a third party for injuries sustained due to the acts of an independent contractor. Mr. and Mrs. Kreilein hired Krueger, a plumber, to install a sewer line at their home. Failing to realize that the Kreileins' old sewer line served as the conduit for the next-door neighbors' sewage, Krueger disconnected the Kreileins' old line from both the Kreileins' home and from the main sewer line and left it uncapped. Consequently, the neighbors' sewage seeped up into the Kreileins' back yard and flowed downhill into the Beckers' basement. The Beckers sued the Kreileins and Krueger, alleging that their house had been "condemned as uninhabitable and that they had suffered life-threatening, permanent injury and other loss from exposure to raw sewage."⁴⁶⁹ The trial court granted summary judgment in favor of all defendants; however, the court of appeals reversed in a split decision.⁴⁷⁰

On transfer, the court first recognized that "Indiana's long-standing general rule is that principals are not vicariously liable for the negligence of their independent contractors."⁴⁷¹ In addressing whether Krueger was an independent contractor, the court noted that while the question of whether "someone is an employee or an independent contractor is generally a question for the trier of fact," a court may decide the issue "if the significant underlying facts are undisputed."⁴⁷² The Beckers contended that because "Krueger recommended the easiest, most cost efficient manner in which the work might be done, but the Kreileins made the ultimate decision" that Krueger was an employee of the Kreileins.⁴⁷³ In rejecting this argument, the court held that, as a matter of law, Krueger was not the Kreileins' employee.⁴⁷⁴

Next, the court noted that "Indiana recognizes five exceptions to the general rule of non-liability of a principal for an independent contractor's negligence."⁴⁷⁵ The exceptions are:

- (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.⁴⁷⁶

At the outset of its analysis, the court noted that the only exception that was applicable to the Beckers' cause of action was exception number four.⁴⁷⁷ The court noted that "[a]s to the fourth exception, the proper inquiry is whether, as

469. *Id.* at 317.

470. *Id.* (referencing *Becker v. Kreilein*, 754 N.E.2d 939 (Ind. Ct. App. 2001)).

471. *Id.* (citing *Bagley v. Insight Communications Co.*, 658 N.E.2d 584, 586 (Ind. 1995)).

472. *Id.* at 318 (citing *Moberly v. Day*, 757 N.E.2d 1007 (Ind. 2001)).

473. *Id.* (Brief for Appellant at 17).

474. *Id.*

475. *Id.*

476. *Id.* (citing *Bagley*, 658 N.E.2d at 586).

477. *Id.*

a matter of law, the principal should have foreseen a danger that was 'substantially similar to the accident that produced the complained-of injury.'"⁴⁷⁸ Therefore, the proper inquiry was "whether the Kreileins should have foreseen that, absent due precaution by Krueger in installing their new sewer line, [the neighbors'] sewage would seep into their yard and be washed downhill to contaminate the Beckers' property. The court concluded that the record did not support the inference that the Kreileins should have expected this outcome; hence, the fourth exception was inapplicable."⁴⁷⁹

Finding that none of the five exceptions to the general rule that a principal will not be liable for the acts of an independent contractor was applicable to the facts at issue, the court held that the trial court was correct in granting summary judgment in favor of the Kreileins.⁴⁸⁰ With regard to the Beckers' recourse against the plumber, the court agreed with the court of appeals that there existed genuine issues of material fact as to "whether Krueger left the sewer line in a dangerously defective or imminently dangerous condition."⁴⁸¹ Thus, the court summarily affirmed the court of appeals ruling to reverse the trial court's grant of summary judgment in favor of Krueger.⁴⁸²

In *Peters v. Forster*,⁴⁸³ the court of appeals examined whether an independent contractor who performs work in knowing or negligent violation of applicable building codes owes a duty to third parties injured as a result of the defective condition where the work has been completed and accepted by the owner or general contractor.

The Hamms, both in poor health, purchased a pre-built ramp to allow access to their home. Forster, the Hamms' landlord and an independent contractor, charged the Hamms seventy-five dollars to have two of his employees transport and install the ramp at the Hamms' residence. Forster later testified that, although he was unfamiliar with the applicable building codes, he was aware that the ramp was too steep and did not comply with the applicable building codes for handicapped ramps. He also stated that he was unaware that the ramp would be used as a handicapped or wheelchair ramp.

The year following the ramp's installation, Peters delivered a meal to the Hamm's home. Upon exiting the home, he was injured when he slipped on the ramp and fell. Peters filed suit against the Hamms and later added Forster as a party defendant.⁴⁸⁴ The Hamms were dismissed from the case after settlement.⁴⁸⁵ Finding that Forster owed no duty of care to Peters, the trial court granted

478. *Id.* (quoting *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 857 (Ind. 1999)).

479. *Id.*

480. *Id.*

481. *Id.* at 319.

482. *Id.*

483. 770 N.E.2d 414 (Ind. Ct. App. 2002), *reh'g denied*, 2002 Ind. App. LEXIS 1333 (Ind. Ct. App. July 31, 2002), *trans. granted and vacated by* 2003 Ind. LEXIS 13 (Ind. Jan. 16, 2003).

484. *Id.*

485. *Id.*

summary judgment in Forster's favor.⁴⁸⁶

On appeal, the court noted that to succeed in their negligence claim, the Peters must prove that (1) a duty was owed to them by Forster; (2) Forster breached that duty; and (3) their injuries were proximately caused by Forster's breach.⁴⁸⁷ Relying upon Indiana's long-standing rule that independent contractors do not owe a duty of care to third parties after an owner accepts a contractor's work, Forster argued that he owed no duty to the Peters upon the Hamms' acceptance of his work.⁴⁸⁸ Further, "evidence of [an] independent contractor's mere negligence is insufficient to impose liability against the contractor after acceptance of the work by the general contractor or owner."⁴⁸⁹

The court next observed that several factors may be considered in determining whether the Hamms accepted Forster's work. These factors include whether "(1) the owner or its agent reasserted physical control over the premises or instrumentality; (2) the work was actually completed; (3) the owner expressly communicated an acceptance or release of liability; or (4) the owner's actions permit a reasonable inference that the work was accepted."⁴⁹⁰ The court noted that the rule relieving the contractor of liability once his work has been accepted is rooted in the premise that the owner, having control of the premises, is generally in the best position to prevent harm to third parties.⁴⁹¹

The court determined that Forster actually completed the work and the Hamms reasserted physical control over their premises.⁴⁹² The court noted that "[a]lthough there is evidence that Mrs. Hamm did not expressly communicate an acceptance, the reasonable inference to be drawn from the evidence before us is that the work was in fact accepted."⁴⁹³

Having established that acceptance occurred, the court next addressed whether any of the exceptions to the acceptance rule were applicable under the circumstances.⁴⁹⁴ Despite the general rule that a contractor owes no duty to third parties once an owner accepts the contractor's work, a contractor may be liable where the work was left "in a condition that was dangerously defective, inherently dangerous or imminently dangerous such that it created a risk of imminent personal injury."⁴⁹⁵ The court further noted that if "the thing sold or

486. *Id.*

487. *Id.* at 417 (citing *Wickey v. Sparks*, 642 N.E.2d 262, 265 (Ind. Ct. App. 1994)).

488. *Id.* (citing *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996)(citing *Daugherty v. Herzog*, 44 N.E. 457 (1896))).

489. *Id.* (citing *U-Haul Intn'l Inc. v. Mike Madrid Co.*, 734 N.E.2d 1048, 1052 (Ind. Ct. App. 2000)).

490. *Id.* (citing *U-Haul, Int'l*, 734 N.E.2d at 1052) (quoting *Blake*, 674 N.E.2d at 171).

491. *Id.* (citing *Kostidis v. Gen. Cinema Corp.*, 754 N.E.2d 563, 568 (Ind. Ct. App. 2001) (citing *Blake*, 674 N.E.2d at 171)).

492. *Id.* at 419.

493. *Id.*

494. *Id.*

495. *Id.* at 418 (citing *U-Haul, Int'l*, 734 N.E.2d at 1052 (quoting *Hill v. Rieth-Riley Constr. Co.*, 670 N.E.2d 940, 944-45 (Ind. Ct. App. 1996))).

constructed be not imminently dangerous to human life, but may become such by reason of some concealed defect, then a liability may arise against such vendor or constructor if he knew of the defect and fraudulently concealed it."⁴⁹⁶

Ultimately, the court reversed the trial court finding that latent defects existed in the ramp due to its failure to comply with applicable building codes.⁴⁹⁷ The court opined that Forster installed a ramp, the quality of which did not comply with the building codes, and which created a dangerous condition that was not easily ascertainable by the Hamms. The latent defects, which were not discoverable by the Hamms reasonable inspection, revealed themselves after installation of the ramp. Forster, as the independent contractor, was in a better position to prevent the harm given his experience and expertise. Independent contractors should not be immune when they knowingly or negligently violate building codes. Accordingly, the court reversed the trial court's grant of summary judgment in favor of Forster and remand for further proceedings.⁴⁹⁸

IX. JURY INSTRUCTIONS

In *Wal-Mart Stores, Inc. v. Wright*,⁴⁹⁹ the Indiana Supreme Court addressed the propriety of a jury instruction that instructed the jury to consider violations of Wal-Mart policies in deciding whether Wal-Mart was negligent. The instruction at issue further stated that such violations were evidence tending to show the degree of care that Wal-Mart itself recognized as ordinary care.⁵⁰⁰

Wright sued Wal-Mart alleging negligence in the maintenance, care and inspection of its property after she slipped in a puddle of water at a Wal-Mart store.⁵⁰¹ At trial, the parties stipulated to the admissibility of multiple Wal-Mart employee documents collated as a "Store Manual."⁵⁰² At the conclusion of the trial, Wright tendered the following instruction:

There was in effect at the time of the Plaintiff's injury a store manual and safety handbook prepared by the Defendant, Wal-Mart Stores, Inc., and issued to Wal-Mart Stores, Inc., employees. You may consider the violation of any rules, policies, practices and procedures contained in these manuals and safety handbook along with all of the other evidence and the court's instructions in deciding whether Wal-Mart was negligent.

The violation of its rules, policies, practices and procedures are a proper item of evidence tending to show the degree of care recognized by Wal-

496. *Id.* (citing *Nat'l Steel Erection v. Hinkle*, 541 N.E.2d 288, 292 (Ind. Ct. App. 1989) (quoting *Holland Furnace Co. v. Nauracaj*, 14 N.E.2d 339, 342 (1938); *Snider v. Bob Heinlin Concrete Constr. Co.*, 506 N.E.2d 77, 81 (Ind. Ct. App. 1987)).

497. *Id.* at 419.

498. *Id.* at 419-20.

499. 774 N.E.2d 891 (Ind. 2002).

500. *Id.*

501. *Id.* at 892.

502. *Id.*

Mart as ordinary care under the conditions specified in its rules, policies, practices and procedures.⁵⁰³

Wal-Mart objected to the instruction asserting that a party should not be penalized for setting standards for itself that exceed ordinary care. Wal-Mart further argued that ordinary care is decided by the jury.⁵⁰⁴ The trial court overruled Wal-Mart's objection and the plaintiff's tendered instruction became final.⁵⁰⁵ The jury found in Wright's favor and "assessed Wright's total damages at \$600,000, reduced to \$420,000 by 30% comparative fault attributed to Wright."⁵⁰⁶ The court of appeals affirmed the trial court's decision "holding the challenged [second] paragraph of the instruction was proper because it 'did not require the jury to find that ordinary care, as recognized by Wal-Mart, was the standard to which Wal-Mart would be held' . . . and because the trial court had not 'instructed the jury that reasonable or ordinary care was anything other than that of a reasonably, careful and ordinarily prudent person.'"⁵⁰⁷

On transfer, the Indiana Supreme Court initially noted that since Wal-Mart was challenging the second paragraph of the instruction as an incorrect statement of the law, the proper standard of appellate review was *de novo*.⁵⁰⁸ The court considered Wal-Mart's argument that the second paragraph of the instruction invited the jury to apply Wal-Mart's subjective view of the standard of care as set forth in its Store Manual, "rather than an objective standard of ordinary care."⁵⁰⁹ Wright countered that the instruction's language did not convert the objective standard to a subjective standard; instead, Wright asserted that the second paragraph "simply allows jurors to consider Wal-Mart's subjective view of ordinary care as some evidence of what was in fact ordinary care."⁵¹⁰

The supreme court opined that Wal-Mart was correct in its assertion that its rules and policies "may exceed its view of what is required by ordinary care in a given situation."⁵¹¹ The supreme court also noted that "[t]he law has long recognized that failure to follow a party's precautionary steps or procedures is not necessarily failure to exercise ordinary care."⁵¹² Furthermore, the supreme court agreed with Wal-Mart's position that the instruction, as worded, "invites jurors to apply Wal-Mart's subjective view—as evidenced by the Manual—rather than an objective standard of ordinary care."⁵¹³

503. *Id.* at 893.

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.* (quoting *Wal-Mart Stores, Inc. v. Wright*, 754 N.E.2d 1013, 1018 (Ind. Ct. App. 2001)).

508. *Id.* at 893-94 (citing *Brown v. State*, 703 N.E.2d 1010, 1019 (Ind. 1998)).

509. *Id.* at 894.

510. *Id.*

511. *Id.*

512. *Id.* (citing 57A AM. JUR. 2D *Negligence* § 187 at 239 (1998)).

513. *Id.* at 895.

By unanimous opinion, the Indiana Supreme Court reversed the trial court judgment and remanded the case for a new trial based upon the court's conclusion that "the second paragraph of Final Instruction 17 was an improper invitation to deviate from the accepted objective standard of ordinary care and therefore incorrectly stated the law."⁵¹⁴

X. SET OFFS

In *R.L. McCoy, Inc. v. Jack*,⁵¹⁵ the Indiana Supreme Court addressed whether a non-settling defendant was entitled to a credit for amounts paid by nonparty defendants who settled with the plaintiff prior to trial. Michael Jack was severely injured while he was attempting to pass another vehicle in a construction zone. In addition to suing the State of Indiana, Jack sued the construction project's contractor, R.L. McCoy, Inc. ("McCoy") and a subcontractor. Prior to trial, the Jacks entered into a "loan receipt" agreement with McCoy in which they released McCoy from the suit in exchange for \$1.5 million.⁵¹⁶ In relevant part, the loan agreement read as follows:

7. The parties acknowledge that to the extent an as yet unquantified portion of the Settlement Payment would otherwise constitute a credit, setoff, or partial satisfaction to the benefit of any other defendant if it were not a loan, that as yet unquantified sum is a loan. Accordingly, to the extent that:

- a. The settlement payment exceeds a final non-party verdict (total damages suffered by the plaintiffs multiplied by the percentage at fault, if any, on the part of McCoy (against McCoy)

AND

- b. If such excess of the settlement payment over the amount of the non-party verdict against McCoy would otherwise operate to reduce the amount which S.E. Johnson, Inc., the Indiana Department of Transportation, or the State of Indiana or any other defendant against whom a final jury verdict is rendered is obligated to pay as a result of the final verdict in said action, after all appeals have either been abandoned or exhausted, if it were not a loan,

THEN the amount of the excess which would otherwise reduce the amount another defendant is obligated by a verdict to pay if the excess

514. *Id.*

515. 772 N.E.2d 987 (Ind. 2002).

516. *Id.*

were not considered a loan, must be repaid by Jack to McCoy.⁵¹⁷

The Jacks proceeded to trial against the State and the subcontractor. The subcontractor asserted a nonparty defense against McCoy pursuant to the Comparative Fault Act.⁵¹⁸ The jury returned a verdict of \$5.4 million, but found McCoy only ten percent at fault and the subcontractor fifteen percent at fault.⁵¹⁹ The subcontractor, therefore, was ordered to pay fifteen percent of \$5.4 million, or \$810,000.⁵²⁰ The subcontractor then moved for a set-off of \$960,000, the amount that McCoy's loan receipt agreement exceeded his \$540,000 obligation under the jury's fault allocation.⁵²¹ McCoy then moved to enforce the repayment provisions of the loan and requested that the Jacks repay McCoy the same \$960,000.⁵²² The trial court denied both motions.⁵²³ The same panel of the court of appeals affirmed the denial of the subcontractor's motion but reversed the denial of McCoy's motion.⁵²⁴ The court of appeals "concluded that McCoy's \$960,000 excess payment would have been a credit against Johnson's liability if payment by McCoy to the Jacks were not a loan."⁵²⁵ The Jacks requested transfer.⁵²⁶

On transfer, the court first recognized that in the pre-comparative fault era "credits . . . were a tool to avoid overcompensation of plaintiffs . . . [and] were a tool to avoid a single defendant bearing too much responsibility for the plaintiff's damages."⁵²⁷ The court opined that Indiana's comparative fault system rectified these issues by replacing joint and several liability with several liability.⁵²⁸ Further, the defendants were allowed to assert a nonparty defense; thereby, defendants were permitted to prove the negligence of the absent tortfeasor.⁵²⁹ The subcontractor asserted a nonparty defense against McCoy and the jury apportioned fault accordingly.⁵³⁰ Hence, the court determined that if the subcontractor were entitled to a \$960,000 credit, the subcontractor's "liability would have been eliminated despite its being found at greater fault than McCoy. Thus, elimination of credit requires the comparative fault defendant to pay for its

517. *Id.*

518. *Id.* (citing IND. CODE § 34-51-2-14 (1999)).

519. *Id.*

520. *Id.*

521. *Id.* at 988-89.

522. *Id.* at 989.

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.* (citing *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140, 143-44 (Ind. 2000)).

528. *Id.* at 989-90.

529. *Id.* at 990.

530. *Id.* at 988.

own share, but no more."⁵³¹

The court next noted that the plaintiffs were not overcompensated because a "settlement payment normally incorporates an assessment of the exposure to liability" and includes "the parties' desires to avoid the expense and effort of litigation and the tactical effect of eliminating a defendant and its counsel from trial."⁵³² Accordingly, the court expanded its holding in *Mendenhall v. Broadbent & Skinner Co.*⁵³³ In *Mendenhall*, the Indiana Supreme Court held that since the adoption of comparative fault, credits were no longer warranted where the remaining defendant at trial did not assert a nonparty defense against a settling party.⁵³⁴ In expanding on *Mendenhall*, the court found that the settlement agreement between the Jacks and McCoy had no bearing on the subcontractor's liability as assessed by the jury.⁵³⁵ The court observed that "[u]nlike a joint and several liability regime, no other defendant is liable for that claim, and none has a claim to benefit from its overvaluation by the settling defendant or undervaluation by the plaintiff as compared to the jury's assessment."⁵³⁶ Finally, the court concluded that, pursuant to the wording of the loan receipt agreement, McCoy was not entitled to repayment by the Jacks of the \$960,000 that exceeded the jury's assessment of McCoy's liability.⁵³⁷

531. *Id.* at 990.

532. *Id.*

533. 728 N.E.2d 140 (Ind. 2000).

534. *Id.*

535. *R.L. McCoy*, 772 N.E.2d at 991.

536. *Id.*

537. *Id.*

SURVEY OF RECENT DEVELOPMENTS OF THE LAW CONCERNING THE UNIFORM COMMERCIAL CODE

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INTRODUCTION

During the period covered by this survey, there were no reported Indiana Supreme Court cases addressing the Uniform Commercial Code (UCC). The Indiana Court of Appeals issued a limited number of decisions covering the areas of Sales, Negotiable Instruments, Bank Collections, and Investment Securities. These court of appeals decisions do not mark significant developments in Indiana law, but rather provide clarification of existing law and offer helpful points for those engaged in commerce. No federal court decisions offering any substantive discussion of the Indiana UCC were reported in the period covered by this survey.

Cases discussed herein, notably *Brandeis Machinery & Supply Co., LLC v. Capitol Crane Rental, Inc.*,¹ and *Roberts v. Agricredit Acceptance Corp.*,² reflect fundamental principles of the UCC and Indiana law that parties are free to contract—even when the result is not as favorable as they might like. This means that parties to commercial contracts are entitled to the benefit of the bargain they make, but that the courts will not step in and convert a commercial transaction into a tort or impose fiduciary-like obligations on the parties.

I. ARTICLE 2—SELLER'S REMEDIES

In *Brandeis Machinery & Supply Co., LLC v. Capitol Crane Rental, Inc.*, the court of appeals addressed the appropriate measure of damages when a buyer made an effective, but nonetheless wrongful, rejection of goods.³ Brandeis and Capitol originally entered into an agreement whereby Brandeis leased a thirty-five ton crane to Capitol for a six-month period.⁴ After first extending the lease agreement for a second six-month period, Capitol entered into an agreement dated June 16, 1999 to purchase the crane.⁵ Capitol agreed to buy the crane for \$291,773.46 “as is-where is.”⁶ Brandeis signed the contract on June 22, 1999,

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1. 765 N.E.2d 173 (Ind. Ct. App. 2002).

2. 764 N.E.2d 776 (Ind. Ct. App. 2002).

3. *Brandeis*, 765 N.E.2d at 173.

4. *Id.* at 175.

5. *Id.*

6. *Id.* The contract also provided that the payment terms were “Net 10 days from invoice date If not paid on due date, 2% per month service charge will be applied.” *Id.*

and sent an invoice for the crane to Capitol on June 29, 1999.⁷

In June 1999, a third party inquired about purchasing Capitol.⁸ Capitol's owner decided to sell the business to the third party.⁹ Capitol promptly made some repairs to the crane and returned it to Brandeis.¹⁰ Brandeis refused to attempt to re-sell the crane, and maintained that Capitol was the owner of the Crane.¹¹ Eventually, Brandeis expended \$9,794.86 to inspect the repairs that Capitol had made to the crane.¹² At the trial, Brandeis' Indianapolis Branch Manager testified that the inspection was made because he was under the impression that the parties had come to some form of agreement and that Brandeis would attempt to sell the crane.¹³ Brandeis' lead salesman also testified at trial that Brandeis had a practice of allowing customers to cancel contracts when money had not yet been exchanged and that Brandeis considered a transaction "final" only "when payment was made."¹⁴

Following the trial, both parties submitted post-trial briefs that included their calculation of the appropriate amount of Brandeis' damages. Brandeis contended it was entitled to the contract price (\$291,773.46) and interest upon the contract price that had reached \$159,302.38 as of May 31, 2001.¹⁵ In addition, Brandeis also included the inspection costs it had incurred after Capitol returned the crane, for a total demand of \$460,870.70.¹⁶ In reply, Capitol stated that if any damages were due then they should be limited to the difference between the fair market value of the crane and the contract price at the time of rejection.¹⁷ This would result in an award of \$19,273.46. The court awarded Brandeis \$29,067.00, which apparently represented the trial court's acceptance of the measure of damages proposed by Capitol, together with its award of the amount expended by Brandeis in inspecting the crane repairs.¹⁸

Brandeis appealed the trial court's decision to reject Brandeis' contract price as the correct measure of damages and because the trial court did not award any late-payment charges to Brandeis. Brandeis first alleged that it was entitled to the full contract price under section 26-1-2-709 of the Indiana Code because Capitol had accepted the crane before returning it.¹⁹ The court of appeals began its analysis by noting that the UCC did not provide much guidance as to the

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 175-76.

14. *Id.* at 176.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 177.

appropriate level of damages in the case before it.²⁰ The court of appeals observed that one of the principles animating the UCC's remedial provisions was that "the aggrieved party be put in as good a position as if the other party had fully performed, but not in a better position."²¹ This principle is consistent with Indiana common law of contracts.²²

The court went on to note correctly that, under section 26-1-2-709, an action for the price of goods may be maintained only if a buyer has accepted goods or the goods have been lost or damaged to the extent that they are not resalable.²³ The UCC, as adopted in Indiana, defines acceptance as the failure "to make an effective rejection."²⁴ If Capitol's rejection had been effective, i.e., if it had not accepted the goods, then the court concluded that the appropriate measure of damages was governed by section 26-1-2-708. Section 26-1-2-708 states that damages should be measured as the difference between the fair market value of the property at the date of rejection and the contract price plus any incidental damages and minus any expenses saved as a result of the buyer's breach.²⁵ The court, therefore, analyzed whether Capitol had made an ineffective rejection of the crane so as to justify Brandeis' proposed remedy.

The court carefully drew the distinction between the issue as to whether a rejection was "wrongful" and whether it was "effective." The court acknowledged that Capitol's rejection was "wrongful" in that it had rejected goods that conformed to the contract with Brandeis, but correctly identified the relevant inquiry for purposes of determining the correct amount of damages as whether the rejection was "effective."²⁶ This distinction between an effective, but "wrongful," rejection and an ineffective rejection is also consistent with the underlying policy of the UCC and Indiana contract law to permit parties to break contracts without imposing punitive sanctions.²⁷ The parties to a commercial sales contract are entitled to the benefit of their bargain—no less, but no more.

Under section 26-1-2-602(1) of the Indiana Code, a rejection of goods must be made "within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."²⁸ This determination, the court of appeals noted, was obviously dependent upon the "nature, purpose, and circumstances of the situation."²⁹ In the present case, the court of appeals concluded that the trial court was justified in finding that Capitol's rejection was effective because Capitol promptly returned the crane, the evidence demonstrated that Brandeis had a policy of canceling contracts after customers signed them but

20. *Id.*

21. *Id.*

22. *See, e.g., Allstate Ins. Co. v. Hammond*, 759 N.E.2d 1162, 1166-67 (Ind. Ct. App. 2001).

23. *Brandeis*, 765 N.E.2d at 177.

24. IND. CODE § 26-1-2-606 (2002).

25. *Brandeis*, 765 N.E.2d at 178.

26. *Id.* at 178-79.

27. *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 981 (Ind. 1993).

28. *Brandeis*, 765 N.E.2d at 177.

29. *Id.* at 179.

before any money was exchanged, Brandeis' salesman had testified that transactions were considered final only when payment was made, and Brandeis had inspected the crane after its return to prepare it for sale.³⁰ *Brandeis* demonstrates the critical distinction between, and consequences flowing from, a buyer's effective or ineffective rejection. In this case, the distinction accounted for a difference of several hundred thousand dollars.³¹ Close attention should be paid to the guidance in the *Brandeis* decision as to what measure of damages is appropriate when a party rejects goods that conform to the parties' contract. *Brandeis* confirms that a party rejecting goods should always strive to notify the seller as soon as possible as to its intent to reject.

II. ARTICLE 2A—FRAUDULENT INDUCEMENT OF LEASE CONTRACT

In *Lighting Litho, Inc. v. Danka Industry, Inc.*,³² the court of appeals confirmed that Indiana is among those jurisdictions that measure damages in fraudulent inducement and fraudulent misrepresentation cases using the "benefit of the bargain" rule. Litho was a small printer that typically produced 5000 to 20,000 copies per month.³³ Danka's salesman continually pressured Litho to lease a high-capacity copier that could produce 500,00 to 1,000,000 copies per month.³⁴ Danka's salesman and a company manager represented to Litho's owner that they would provide to Litho an existing business account that would more than off-set the cost of the lease and, in fact, allow Litho to make a profit, if Litho leased the high-capacity machine.³⁵ Litho's owner ultimately agreed to enter into a lease for a sixty-month period at a cost of \$755 per month. Litho also signed a service and supply contract.³⁶ After signing the lease, Litho quickly found out that the supposed contract did not exist, and it sued to rescind the lease contract.³⁷ During the trial, Litho changed its strategy and amended its complaint to ask for tort and breach of contract damages.³⁸ At the close of the trial, the trial court granted Danka's motion for judgment on the evidence on the grounds that Litho had failed to present any evidence to support its request for damages.³⁹ The trial court based its ruling on the fact that Litho had asked the court to award it a sum representing the total lease payments due under the contract, which the court characterized as "rescission" damages that were not available after Litho

30. *Id.*

31. The difference may have been more obvious in this case because the seller admitted that it had a business practice of allowing customers to cancel executed contracts.

32. 776 N.E.2d 1238 (Ind. Ct. App. 2002).

33. *Id.* at 1240.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1241-42.

affirmed the contract.⁴⁰

On appeal, Litho alleged that it had provided sufficient evidence to support its claim for fraudulent inducement. The court first noted that a party bringing an action for fraud in the inducement must elect between two remedies: either to rescind the contract and return to the *status quo ante* or to affirm the contract and keep the benefits and seek damages.⁴¹ Further, “[w]here a party elects to affirm a contract induced by fraudulent misrepresentations, the party may only seek tort damages.”⁴² These damages are measured using the “benefit of the bargain” rule that requires the fraudulent party to place the other party in as good a position as it would have been in if the fraudulent representations had not been made or the fraudulent promises had actually been performed.⁴³ The court of appeals reversed the trial court because it found that Litho had presented sufficient evidence as to its expected “benefit of the bargain” when it submitted its evidence as to Danko’s representation that Litho could expect \$50,000 of profits as a result of entering into the lease.⁴⁴

III. ARTICLE 3.1—DEFENSES TO NEGOTIABLE INSTRUMENTS

*Roberts v. Agricredit Acceptance Corp.*⁴⁵ construes the provisions of Article 3.1 of the UCC dealing with the defenses available to an obligor under a negotiable instrument and reinforces the basic proposition that a party should read a contract before signing it. Section 26-1-3.1-305(1)(c) of the Indiana Code provides that an obligor may state a defense against enforcement of its obligations under an instrument due to “fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms.”⁴⁶ In this case, Roberts executed a lease agreement with its equipment supplier, Sulphur Implement Corporation. Sulphur subsequently assigned the lease to Agricredit Acceptance Corporation.⁴⁷ Upon Roberts’ default under the lease agreement, Agricredit asserted that it was a holder in due course of the lease agreement and moved for summary judgment.⁴⁸ In reply, Roberts raised the defense of fraud under section 26-1-3.1-305.⁴⁹

Roberts did not allege that it did not sign the lease agreement or that Agricredit was not a holder in due course of the lease agreement. Rather, Roberts contended that it had signed the lease agreement in blank upon the express condition that it would apply only to new farm and construction

40. *Id.* at 1243.

41. *Id.* at 1241.

42. *Id.*

43. *Id.* at 1242.

44. *Id.* at 1243.

45. 764 N.E.2d 776 (Ind. Ct. App. 2002).

46. *Id.* at 779.

47. *Id.* at 777-78.

48. *Id.* at 778.

49. *Id.*

equipment. Roberts further claimed that it would not have signed the lease agreement if it had known that it would be applied to the equipment actually listed, which Roberts claimed was of "poor quality and age."⁵⁰ Roberts contended that, by including this substandard equipment instead of the new equipment, Sulphur had committed fraud in inducing Roberts' execution of the lease agreement, and that Sulphur's fraud constituted a complete defense to Agricredit's action against Roberts.⁵¹

The court of appeals began its analysis by noting that consideration of any claim of fraud requires evaluation of both the fact of reliance and the right of reliance.⁵² Although the court of appeals was prepared to accept that Roberts in fact relied upon Sulphur's statements as to the quality of the equipment that the lease agreement would cover, it held that Roberts was not, however, entitled to rely upon those statements and had failed to contest Sulphur's provision of the equipment pursuant to the lease agreement.⁵³ The court summarized the right of reliance as follows, "A man who can read and does not read an instrument which he signs is, as a general rule, guilty of negligence."⁵⁴ This rule is based upon a party's duty to be diligent in protecting its own interests. Roberts was aware that he was signing a lease agreement and did not allege that he was not given the opportunity to discover the transaction's essential features and terms before doing so. The law will not protect Roberts from his own failure to read the lease agreement before signing it.⁵⁵

IV. ARTICLE 4—IMMUNITY OF BANK PURSUANT TO GARNISHMENT ORDER

Although *Title Search Co., Inc. v. 1st Source Bank*⁵⁶ does not directly address Article 4 of the UCC, it does confirm that a bank does not have a duty under Article 4 to challenge a garnishment order on behalf of its depositor. On November 20, 1996, the United States District Court for the Northern District of Indiana entered judgment against Title Search.⁵⁷ Following the judgment, the district court sent 1st Source a notice of garnishment proceedings as a result of which the court eventually ordered 1st Source to disburse funds from Title Search's accounts to the plaintiff.⁵⁸ Title Search subsequently filed suit against 1st Source in state court claiming that 1st Source had disbursed funds from its escrow account without its authorization and was therefore liable for breach of fiduciary duty, breach of contract, conversion, and a violation of Indiana's UCC

50. *Id.*

51. *Id.* at 778-79.

52. *Id.* at 779.

53. *Id.* at 779-80.

54. *Id.* (quoting *Robinson v. Glass*, 94 Ind. 211, 212 (1883)).

55. *Id.* at 780.

56. 765 N.E.2d 167 (Ind. Ct. App. 2002).

57. *Id.* at 169.

58. *Id.*

provisions.⁵⁹ The court summarily disposed of Title Search's claims. First, the court upheld the trial court's determination that section 34-25-3-15 of the Indiana Code provides immunity to banks that comply with an apparent garnishment order even if the garnishment order is later determined to be procedurally defective.⁶⁰ The court then turned to Title Search's argument that even if the garnishment order was valid that 1st Source breached its statutory duty to it by failing to take "any lawful and legal steps to have the [garnishment] order delayed, reconsidered, or set aside."⁶¹ In rejecting this claim, the court noted that Title Search's position would require 1st Source to disobey a court order, which 1st Source could not do. Further, the court noted that even if 1st Source had expressly contracted to take the action that Title Search wanted it to take, then this contract provision would be contrary to established public policy and unenforceable.⁶²

V. ARTICLE 8.1—INVESTMENT SECURITIES

*Watson v. Sears*⁶³ involved the validity of a transfer of assets between investment accounts where the signature of one of the registered owners was forged. The case provides some interesting guidance as to when a securities intermediary,⁶⁴ such as Edward D. Jones & Co., L.P., will be liable to an entitlement holder⁶⁵ for an improper transfer. William Watson, Sears' father, opened an account consisting entirely of bonds at Edward Jones that was registered to his daughter and himself as joint tenants with rights of survivorship.⁶⁶ Watson subsequently transferred the account assets to a new account that was registered to his wife Allene, Sears, and him as joint tenants with rights of survivorship.⁶⁷ The document that Watson and Edward Jones executed in order to make the transfer required the signature of all registered owners of the delivering account. Watson signed his own name but forged Sears' signature.⁶⁸ Sears became aware of the transfer of assets after her father's death in September 1999, whereupon she withdrew half of the assets from the account and sued Allene for control of the remaining assets. On August 16, 2001, the trial court entered judgment in favor of Sears and awarded her the remaining assets.⁶⁹

Allene appealed, contending that under section 32-4-1.5-15 of the Indiana

59. *Id.*

60. *Id.* at 171-72.

61. *Id.* at 172 (alteration in original).

62. *Id.* at 173.

63. 766 N.E.2d 784 (Ind. Ct. App. 2002)

64. IND. CODE § 26-1-8.1-102(a)(14) (2002).

65. *Id.* § 26-1-8.1-102(a)(7).

66. 766 N.E.2d. at 785.

67. *Id.*

68. *Id.*

69. *Id.* at 785-86.

Code the signature of only one party to a joint account was necessary to change the form of an account and therefore the fact that Sears' signature was forged was irrelevant.⁷⁰ The court rejected the suggestion that section 32-4-1.5-1 to -15 (the "Indiana Nonprobate Transfers Chapter") applied, based upon its conclusion that the Indiana Nonprobate Transfers Chapter did not apply to bonds.⁷¹ Rather, the applicable governing authority was Article 8.1 of the UCC regarding investment securities. Under Article 8.1, an endorsement, instruction, or entitlement order is effective if it is made by an appropriate person.⁷² The court then looked at how other courts have decided who is an "appropriate person," and found that "when the intermediary has agreed [with the entitlement holders] that the 'appropriate person' to make an order is both owners of a joint account, both owners must make the order."⁷³ As a result, if Edward Jones agreed that both Watson's and Sears' signatures were necessary to effect a transfer of the account, then any transfer lacking both signatures was ineffective.⁷⁴ The court proceeded to find, based upon the evidence, that Sears' signature was necessary for any effective transfer.

Because Sears had only sued Allene, and not Edward Jones, the court was then faced with the question as to whether Sears had a cause of action against Allene. The court found that Article 8.1 did not provide any guidance on this issue so it instead turned to section 26-1-1-103 of the Indiana Code. Section 26-1-1-103 is the provision of the UCC that provides that, unless otherwise displaced by the UCC, the principles of law and equity supplement the provisions of the UCC.⁷⁵ Article 1 of the UCC, and thus section 1-103, is applicable to all Articles of the UCC, including Article 8.1. Sears would be able to reach the funds held by Allene, therefore, by maintaining an action for money had and received. Again, this case demonstrates that parties will be held to their bargain. If Edward Jones contracted with Sears and her father that both their signatures were necessary to make a transfer, then the court will hold them to that agreement, even if it turns out that one of those signatures was forged.

VI. ARTICLE 9—SECURED TRANSACTIONS

In *Leasing One Corp. v. Caterpillar Financial Services Corp.*,⁷⁶ the court reiterated that a buyer in the ordinary course of business only takes free of a security interest created by the buyer's seller and that a lessor of goods could create a security interest under Article 9 (now Article 9.1 in Indiana). Caterpillar originally leased a backhoe loader to Boston Equipment Corporation.⁷⁷ Boston

70. *Id.* at 786.

71. *Id.*

72. IND. CODE § 26-1-8.1-107(b)(1) (2002).

73. *Watson*, 766 N.E.2d at 789 (internal citations omitted).

74. *Id.*

75. *Id.* at 790.

76. 776 N.E.2d 408 (Ind. Ct. App. 2002).

77. *Id.* at 409.

subsequently sold the loader to R & D Homes & Supply, Inc., which purchased it under a commercial lease that was assigned to Leasing One.⁷⁸ Upon Boston's default under the original lease, Caterpillar filed suit against R & D to recover the loader. Although the case was decided under Kentucky law because that is where Caterpillar filed its original financing statement, the same result would have been obtained under Indiana's version of the UCC. Leasing One's first defense was that it was "buyer in the ordinary course of business" and therefore took the loader free of Caterpillar's security interest.⁷⁹ The court rejected this argument, however, by noting that a "holder in the ordinary course" only takes free of security interests created by its seller. Leasing One purchased its interest in the loader from Boston, and thus it did not erase the security interest created by Caterpillar.⁸⁰ Leasing One then attempted to create a material issue of fact as to "whether Caterpillar was a seller with a security interest or a lessor of the backhoe."⁸¹ The court responded that this did not create a material issue of fact because a seller or a lessor of goods could acquire a security interest under the Kentucky statute.⁸² The same outcome would have resulted under Indiana law.⁸³

CONCLUSION

The cases decided during this survey period did not produce any drastic changes in Indiana law. Rather, the cases confirmed Indiana's traditional approach that courts will not step in to rewrite contracts where one party has failed to take appropriate steps to protect its interests barring some recognized fiduciary or other duty. Parties in Indiana are free to contract as they see fit, but even if they make what turns out to be an unwise bargain, they are left with the contract they made, and cannot expect the courts to rewrite the contract or change the bargain.

78. *Id.* at 409-10.

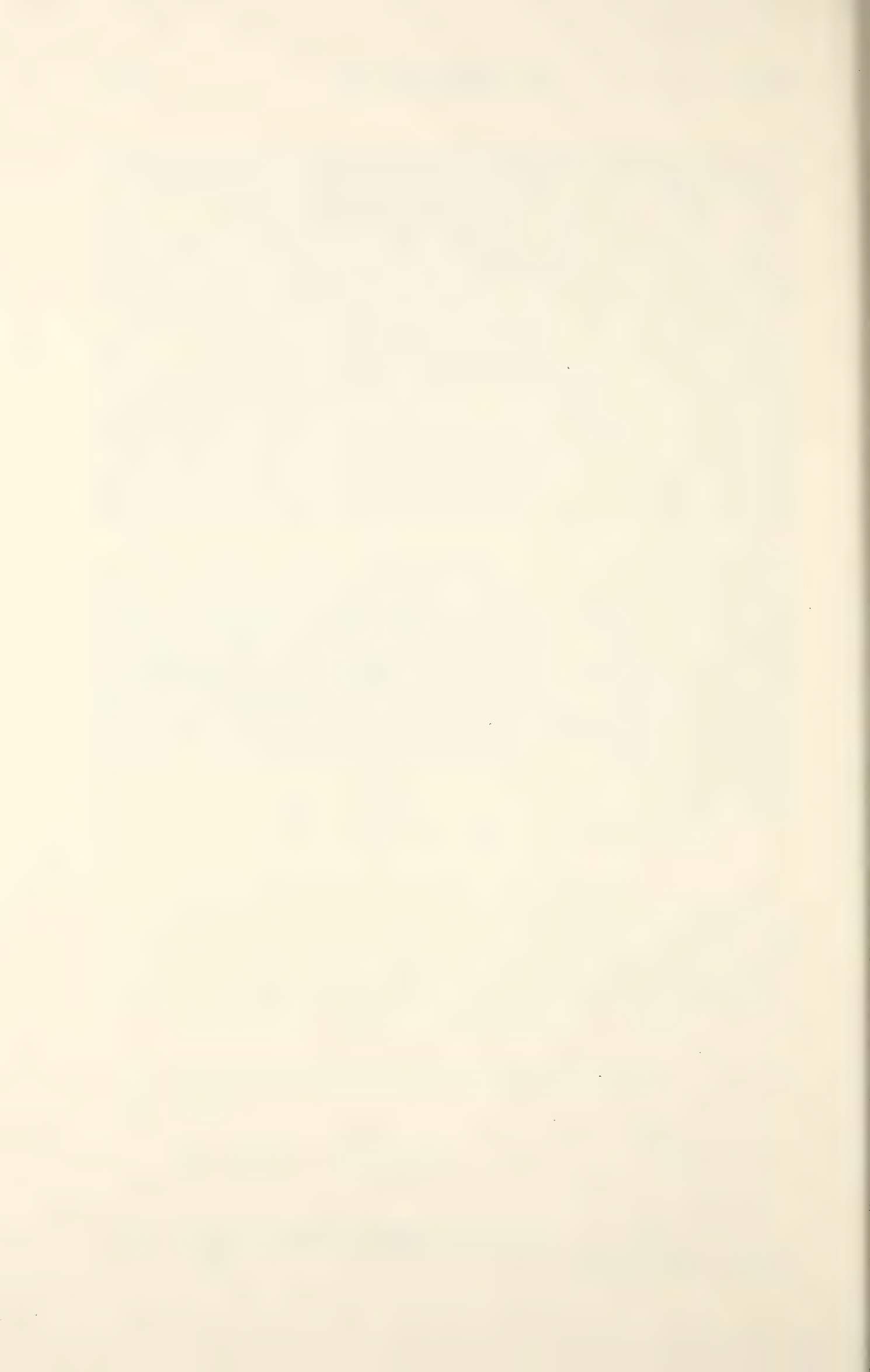
79. *Id.* at 411-12.

80. *Id.* at 412.

81. *Id.*

82. *Id.* at 412-13.

83. IND. CODE § 26-1-1-201(37) (2002) ("a seller or lessor may also acquire a 'security interest' by complying with IC 26-1-9-1.").



NOTES

FRIEND OR FOE: THE ROLE OF MULTIDISCIPLINARY PRACTICES IN A CHANGING LEGAL PROFESSION

KELLYE M. GORDON*

INTRODUCTION

In July 2001, New York became the first state in the nation whose state bar passed provisions allowing regulated business alliances between attorneys and nonattorneys.¹ Although Washington D.C. previously allowed heavily restricted fee-splitting on a limited basis,² no other jurisdiction has taken such a giant step towards addressing what has been called the most important issue to face the legal profession in years—multidisciplinary practices (MDPs).³ Under the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules), several provisions preclude the formation of MDPs and restrict lawyers who enter into partnerships or share fees with nonlawyers.⁴ In contrast, the New York provisions allow attorneys and nonattorneys to enter into cooperative business relationships involving the practice of law provided they adhere to certain restrictions and regulations.⁵

The rules governing the professional conduct of lawyers in the United States

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1. John Caher, *Multidisciplinary Practice Rules Adopted by State*, N.Y. L.J., July 25, 2001, at 1.

2. Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States*, 21 *FORDHAM INT'L L.J.* 190, 207-208 (1997). The District of Columbia modified its rules to permit partnerships and fee splitting between lawyers and nonlawyers. However, it does not permit a nonlawyer and a lawyer to enter into a partnership or share legal fees if the principal purpose of the organization is to provide non-legal services. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*, 13 *GEO. J. LEGAL ETHICS* 217, 243 (2000).

3. See ABA Comm. on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments* (Jan. 1999), at <http://www.abanet.org/cpr/multicomreport0199.html> (last visited Nov. 4, 2002) [hereinafter *Background Paper*].

4. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

5. 22 N.Y.C.R.R. § 1200.5c (2002). However, New York continues to prohibit partnerships between lawyers and nonlawyers if the partnership includes the practice of law. *Id.* § 1200.17.

have precluded the formation of MDPs for many years.⁶ Founded on preserving the lawyer's "professional independence of judgment,"⁷ maintaining confidentiality of client information,⁸ and ensuring that attorneys do not use affiliations with nonlawyer professionals as self-referral "feeders,"⁹ the ABA's stance against MDPs has been, for the most part, unchallenged until recently. In a series of rejected amendments and disbanded commissions, the ABA affirmed its stance against multidisciplinary practices when it adopted an anti-MDP resolution on July 11, 2000, leading many to believe that the MDP debate had been buried, or at least tabled for some time.¹⁰

However, New York's announcement along with the Georgia bar's subsequent indication that it may soon lift its ban on lawyer/nonlawyer fee splitting¹¹ both seem to revive the issue that some commentators jokingly call another kind of MDP: the ABA's "Most-Discussed Problem."¹² Opposing camps on the subject of MDPs are split into two major groups: those who argue that MDPs will provide clients with "one-stop shopping" and those who claim that allowing MDPs will erode the core values of the legal profession.¹³

While the ABA, state bar associations, and the courts struggle to find justification for endorsing MDPs, they might be well served to consider the federal government's attempt to restrict physicians in a manner similar to the ABA's stance against MDPs. Faced with challenges similar to those experienced by the ABA—excessive self-referrals and concern about physicians maintaining independent judgment—in the late 1980s and early 1990s, the federal government enacted amendments to the Medicare laws called the Stark Amendments.¹⁴ These rules restrict fee sharing or physician investment in certain ancillary services such as radiology practices, imaging centers, and medical laboratories. In general, physicians are prohibited from referring patients to entities in which they have a financial interest, unless one of the

6. Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879, 883 (2000).

7. MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt.

8. Michael Myers, *Elder-Comp, L.L.C. A Multi-Disciplinary Prototype for Tomorrow's Elder Law Practice*, 45 S.D. L. REV. 540, 542 (2000).

9. Ward Bower, *The Case for MDPs: Should Multidisciplinary Practices Be Banned or Embraced?*, LAW PRACTICE MGMT., July/Aug. 1999, at 61, 64.

10. Illinois State Bar Ass'n et al., *Revised Recommendation 10F*, at <http://www.abanet.org/cpr/mdprecom10f.html> (last visited Nov. 4, 2002).

11. State Bar of Georgia Disciplinary Comm., Report on Multidisciplinary Practice, Feb. 2001, at http://www.gabar.org/paf/MDR_report.pdf; see also Janet L. Conley & Julia D. Gray, *Georgia Bar's MDP Proposal Puts Curbs on Accounting Link*, FULTON COUNTY DAILY REPORT, July 31, 2001, at 1.

12. ABA Young Lawyers Division, *Commission on Multidisciplinary Practice: The FAQs on MDPs*, at <http://www.abanet.org/yld/tyl/nov99/newtoyou.html> (last visited Nov. 4, 2002).

13. Harrison, *supra* note 6, at 907.

14. See 42 U.S.C. § 1395nn (2000).

statutory exceptions applies.¹⁵

The enactment of the Stark regulations has not proved fruitful for the federal government for several reasons. In addition to increasing costs associated with ancillary service activity,¹⁶ Stark has been difficult to enforce.¹⁷ Critics have stated, and this Note argues, that the restraint on physician investment in ancillary services is analogous to the bar association's restraints on multidisciplinary practices.¹⁸ Both Stark and the ABA's anti-MDP rules have the common goal of ensuring that physicians and lawyers maintain their independent professional judgment. In addition, both rules have suffered setbacks such as difficulty in enforcement, a resulting increase in ancillary service business, and frustration by professionals and consumers based on the inability to participate in comprehensive solutions to medical and legal issues.¹⁹

The ABA has no actual authority over the practice of law.²⁰ The Model Rules are acknowledged as a national standard, but states may promulgate their own rules as necessary. State courts and legislatures have also relied on portions of the Model Code of Professional Responsibility (Model Code)²¹ and the Model Rules in developing their own professional guidelines.²² In fact, approximately forty-one states have adopted a version of the Model Rules.²³ The ABA could be a very viable and useful resource to assist states in establishing guidelines for MDPs. Instead of expending resources to resist the emergence of multidisciplinary practices, the legal community and its clients would fare better if the ABA would concentrate its efforts on determining the most ethical and effective way for attorneys to participate in the establishment and operation of MDPs.

This Note proffers the argument that the ABA's rules against MDPs have created an unrealistic realm of isolation and restraint that will undoubtedly make it difficult for attorneys to meet the needs of sophisticated, demanding clients. Part I of this Note provides an overview of the ABA's stance against multidisciplinary practices. Part II illustrates problems associated with the ABA's anti-MDP position by briefly surveying and analogizing the federal government's Stark guidelines prohibiting physician self-referral involving ancillary services. Part III develops and explores an argument in favor of MDPs.

15. *Id.* § 1395nn(b). Throughout this Note, the term "self-referral" is used to refer to ownership in ancillary services in both the legal and medical professions.

16. Myers, *supra* note 8, at 548.

17. See Anne W. Morrison, *An Analysis of Anti-Kickback and Self-Referral Law in Modern Health Care*, 21 J. LEGAL MED. 351, 394 (2000).

18. Myers, *supra* note 8, at 548.

19. See discussion, *infra* Part II.B.

20. Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 596 (1989).

21. The Model Code of Professional Responsibility served as a precursor to the Model Rules. See *infra* note 30 and accompanying text.

22. Andrews, *supra* note 20, at 596-97.

23. *Id.* at 584.

This Note concludes by suggesting that the ABA endorse MDPs and create guidelines that can be used to encourage the development of such practices, while ensuring that the legal community's clients and professionals are protected.

I. THE ABA'S STANCE AGAINST MULTIDISCIPLINARY PRACTICES

A. *Historical Perspectives*

The precise origin of the ABA's prohibition against MDPs is unclear.²⁴ However, in 1910, New York's highest court affirmed the traditionally rooted prohibition against the practice of law by nonlawyer employees of a business corporation when it stated that the profession of law is not "open to all."²⁵ As a precursor to subsequent declarations that the ABA's anti-MDP stance helps to maintain the lawyer's independent judgment,²⁶ the court said,

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist . . . [where an attorney] would be subject to the directions of the corporation [and its directors], and not to the directions of the client.²⁷

The original version of the Canons of Professional Ethics did not prohibit lawyers from forming partnerships with nonlawyers.²⁸ However, the addition of Canons 33 to 35 in 1928 prohibited partnerships between lawyers and members of other professions, and provided that "[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."²⁹

The express prohibition against fee sharing and partnerships between lawyers and nonlawyers continued when the ABA adopted the Model Code of Professional Responsibility in 1969.³⁰ In 1983, the Model Rules replaced the Model Code. Model Rule 5.4 prohibits a lawyer or law firm from sharing legal

24. *Id.* at 385.

25. *In re Co-operative Law Co.*, 92 N.E. 15, 16 (N.Y. 1910).

26. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1519 (1986).

27. *Co-operative Law Co.*, 92 N.E. at 16.

28. Andrews, *supra* note 20, at 584.

29. CANONS OF PROF'L ETHICS Canon 34 (1928). Canons 33 and 35 provide additional insight into the prohibitions contained within the Canons. Canon 33 required that "[p]artnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." CANONS OF PROF'L ETHICS Canon 33. Canon 35 sought to ensure that a lawyer's professional services were not "controlled or exploited" by laypersons. CANONS OF PROF'L ETHICS Canon 35.

30. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102 (1981); MODEL CODE OF PROF'L RESPONSIBILITY DR 3-103 (1981).

fees with a nonlawyer, except in limited situations.³¹ In addition, the rule forbids lawyers from forming partnerships between lawyers and nonlawyers if any of the activities consist of the practice of law.³² Although the Model Rules were significantly revised in 2002, these provisions remain substantially unchanged.

B. Current Perspectives

The provisions of the Model Rules that currently address multidisciplinary practices are found primarily in Rules 5.4 (a), (b), and (d).³³ Nothing in those rules actually prohibits a lawyer from working with a professional trained in another discipline if such collaboration would help resolve a client's issues. What is forbidden is an "integrated practice" where a lawyer shares fees with a nonlawyer or enters into a partnership with a nonlawyer to provide clients with legal services.³⁴ The term MDP is defined as:

an organization owned wholly or partly by nonlawyers that provides legal services directly to the public through owner or employee lawyers. In practice, MDPs include otherwise independent law firms owned only by lawyers that practice in close cooperation with professional service firms owned exclusively or partly by nonlawyers, usually under contract.³⁵

For example, "a lawyer may directly employ [an accountant] on the lawyer's staff."³⁶ "A lawyer may also own a company employing a professional [from another discipline] or offering certain products created by the nonlawyer professional."³⁷ These examples would be acceptable as long as (1) the attorney maintained independent judgment, (2) the attorney did not abuse the privilege of

31. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983). The exceptions include payments to a deceased or disabled lawyer's estate and payment into a compensation or retirement plan for employees who are not lawyers. *Id.* These exceptions have been called "exceedingly narrow" and irrational by some commentators. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 802 (2d ed. 1998).

32. MODEL RULES OF PROF'L CONDUCT R. 5.4.

33. Rule 5.4 states, in relevant part:

A lawyer or law firm shall not share legal fees with a nonlawyer A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if . . . a nonlawyer has the right to direct or control the professional judgment of the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 5.4. Approximately forty-one states have adopted a version of the Model Rules. *Background Paper*, *supra* note 3.

34. *Background Paper*, *supra* note 3.

35. Bower, *supra* note 9, at 61.

36. *Background Paper*, *supra* note 3.

37. *Id.*

self-referral, and (3) there were no threats to client confidentiality.³⁸ A lawyer could *not*, however, train sales representatives to give legal counsel during the marketing of living trusts.³⁹ Nor could a lawyer enter into a partnership or share legal fees with an accountant.⁴⁰

C. Attempts at Revising the ABA's Prohibition Against MDPs

In 1976, the ABA Commission on Evaluation of Professional Standards, known as the "Kutak Commission," proposed an amendment to Rule 5.4 that would have allowed the formation of MDPs nonlawyer ownership and management of law firms.⁴¹ In addition, fee sharing between lawyers and nonlawyers would have been acceptable, as long as lawyers maintained their professional judgment and client confidentiality was not impaired.⁴² The proposal was met with strong opposition. Among the objections raised was that retail establishments such as Sears would be able to open law firms to compete with traditional firms (which would erode "professionalism" among lawyers).⁴³ In addition, opponents argued that MDPs would interfere with lawyers' professional judgment, and that the change would have a "fundamental but unknown effect on the legal profession."⁴⁴ After the Kutak Commission's five-year study and several months of heated debates, the amendment was struck down, and the ban against MDPs remained in place.⁴⁵

Later in 1998, the MDP question resurfaced when the president of the ABA established a Commission on Multidisciplinary Practice.⁴⁶ The Commission heard "sixty hours of testimony from fifty-six witnesses" and reviewed numerous comments from others before arriving at the recommendation that the Model Rules be revised to allow fee splitting and partnerships between lawyers and nonlawyers.⁴⁷ In spite of reports, testimony, and data supporting the lessening of restrictions, the Commission's recommendation was rejected and an anti-MDP

38. See Andrews, *supra* note 20, at 601-16.

39. See John H. Matheson & Peter D. Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L.J. 577, 577 (2001) (commenting that a Chicago attorney was suspended by the Illinois Supreme Court for helping a company that marketed estate-planning packages by training sales representatives in giving "legal counsel" to clients).

40. See Andrews, *supra* note 20, at 599.

41. *Id.* at 593-94.

42. See Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625, 1629 (2000).

43. *Background Paper*, *supra* note 3.

44. *Id.*

45. Andrews, *supra* note 20, at 596.

46. See ABA Comm. on Multidisciplinary Practice, *Report*, at <http://www.abanet.org/cpr/mdprecommendation.html> (last visited Nov. 4, 2002).

47. *Id.*

resolution was adopted. In addition, the ABA disbanded the Commission.⁴⁸

D. Arguments Behind the Anti-MDP Position

Although opponents of MDPs offer a myriad of reasons in support of maintaining the ABA's anti-MDP stance, three common arguments surface most often.⁴⁹

1. *Professional Independent Judgment.*—The rationale underlying the argument that MDPs would give nonlawyers control over lawyers was described in *Emmons, Williams, Mires & Leech v. State Bar of California*,⁵⁰ where the Court of Appeals of California stated, "fee splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit rather than the client's fate."⁵¹ The comment to Model Rule 5.4 states that the prohibitions on nonlawyer involvement are to "protect the lawyer's professional independence of judgment."⁵² This rationale has been offered so frequently that it may appear as rhetoric to some members of the legal community. Two examples may help to illustrate the potential conflict.

a. *Illustrations.*—Suppose a nonlawyer businessperson, aiming to profit from the need for moderately priced, standardized legal services establishes a business that employs lawyers to provide the needed services.⁵³ There may be a tendency for the nonlawyer manager to set time limits on the attorneys in order to improve profits by increasing the volume of cases handled.⁵⁴ Such pressures from the employer could create a potential conflict of interest for the lawyer who owes his client loyalty, but is also concerned about his own job performance.

Another example further illustrates the potential conflicts involved in the operation of MDPs. Consider a real estate development partnership between a nonlawyer and a lawyer. Suppose the nonlawyer partner is a realtor who has invested a great deal of the firm's time and financial resources in a client's real

48. John Gibeaut, "It's a Done Deal": *House of Delegates Vote Crushes Chances for MDP*, 86 A.B.A. J. 92, 92 (2000) (noting that by a margin of nearly three to one, the ABA voted to maintain its stance against MDPs and to disband the committee formed to study possible changes).

49. This section of the Note discusses three objections: (1) interference with professional independent judgment, (2) concern over the unauthorized practice of law by laypersons, and (3) the risk of exposure of confidential client information. Part III.B. discusses concerns over excessive self-referrals, which extend from unease about maintaining professional judgment.

50. 6 Cal. App. 3d 565 (1970).

51. *Id.* at 573-74. See also *In re Co-operative Law Co.*, 92 N.E. 15, 16 (N.Y. 1910), where the court stated that "[t]he relation of attorney and client . . . cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation" because "[t]he corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only." *Id.*

52. MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt (1983).

53. Andrews, *supra* note 20, at 606.

54. Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 407 (1988).

estate project.⁵⁵ The lawyer partner is asked to evaluate the project to determine if it complies with the law. "In such a situation, the lawyer partner [could be faced with] a potential conflict of interest caused by her divided loyalty to partner and client."⁵⁶

b. Response.—As illustrated in the previous scenarios, concerns regarding a lawyer's ability to maintain professional independent judgment are valid. However, the possibility of nonlawyer interference with a lawyer's independent judgment exists under the present system. For example, many lawyers practicing in the private sector are paid by nonlawyers to provide legal services to a client. This occurs, for example, when an insurance company provides counsel to defend an insured⁵⁷ or when a corporation pays the legal expenses to defend an employee.⁵⁸ Such situations present the same concerns over a lawyer's ability to maintain independent judgment, and such situations are currently addressed in Model Rules 1.7(b),⁵⁹ 1.8(f),⁶⁰ and 5.2(a).⁶¹

Perhaps most significant is that "the Supreme Court [of the United States] has found little support for the argument that nonlawyer involvement might impair a lawyer's professional independence in the context of nonprofit organizations that provide the services of lawyers to members."⁶² In *NAACP v. Button*,⁶³ the Court upheld the right of a political organization to finance or promote the services of particular lawyers for their members.⁶⁴ The State of Virginia had enacted a law making it a crime and a violation of the ABA's Canons of Professional Ethics for a person to refer another person to a particular attorney or group of attorneys such as the staff of the NAACP. The Court found that the NAACP's activities were modes of expression and association protected by the First and Fourteenth Amendments that the State could not prohibit under

55. Andrews, *supra* note 20, at 606.

56. *Id.*

57. HAZARD & HODES, *supra* note 31, at 807.

58. Andrews, *supra* note 20, at 607.

59. "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person." MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1983).

60. "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; [and] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." MODEL RULES OF PROF'L CONDUCT R. 1.8(f).

61. "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." MODEL RULES OF PROF'L CONDUCT R. 5.2(a).

62. Andrews, *supra* note 20, at 609.

63. 371 U.S. 415 (1963).

64. *Id.* at 428-29; *see also* United Transp. Union v. State Bar of Mich., 401 U.S. 576, 580 (1971); Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (establishing same principle for unions, along with allowing unions to provide legal services through lawyers employed by the unions).

its power to regulate the legal profession.⁶⁵ As a direct result of the Court's decisions in *Button*, *United Transportation Union*, and *Brotherhood of Railroad Trainmen*, "the ABA and most states [have] amended their professional rules to allow nonprofit entities to offer the services of lawyers."⁶⁶

2. *Unauthorized Practice of Law by Laypersons.*—An additional justification that has been articulated as a reason for maintaining the anti-MDP position is that such arrangements further the potential of the unauthorized practice of law by laypersons.⁶⁷ An example should help illustrate the general theory.

a. *Illustration.*—Suppose a law firm that handles routine work such as simple wills and divorces is owned and managed by a nonlawyer investor. In an effort to manage costs and to ensure that lawyers are available for more complex transactions, managers might instruct nonlawyer personnel to use standardized forms to prepare wills and divorce documents. This arrangement raises the concern that a client's legal rights could be adversely affected because such documents could be "completed without the review or supervision of a lawyer."⁶⁸

b. *Response.*—The argument that removing barriers to MDPs would lead to the unauthorized practice of law by laypersons ignores the existing prohibitions against such behavior. In many jurisdictions, nonlawyers who engage in the unauthorized practice of law are subject to the same duty of care as lawyers.⁶⁹ Nonlawyers who undertake the practice of law without the proper training and credentials are subject to civil liability for breach of fiduciary duties and breach of duties of care owed to clients. For example, under the Restatement (Second) of Torts, "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."⁷⁰

Additional safeguards exist. The Model Rules prohibit a lawyer from assisting nonlawyers in the unauthorized practice of law.⁷¹ In addition, some nonlawyer professionals in the health, education, and business professions have similar duties of ethical responsibility imposed on them by their respective fields'

65. *Button*, 371 U.S. at 428-29.

66. Andrews, *supra* note 20, at 609-10.

67. Gilbert & Lempert, *supra* note 54, at 404-05.

68. *Id.* at 404. Gilbert and Lempert cite an ABA unpublished staff memorandum that listed this concern as one of four primary reasons for maintaining the ABA's anti-MDP stance. Furthermore, the memorandum stated, "[a] ban [on nonlawyer participation] eliminates even the risk of the dangers being present." *Id.* at 403 (quoting ABA Memorandum Subject: Model Rule 5.4 (Professional Independence of a Lawyer) at 7-8 (Apr. 22, 1987)).

69. See, e.g., *Bowers v. Transamerica Title Ins. Co.*, 675 P.2d 193, 198-200 (Wash. 1983) (escrow agent who engaged in the unauthorized practice of law by preparing escrow instructions, promissory note, and statutory warranty deed was bound by the standards governing attorneys).

70. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

71. "A lawyer shall not . . . (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (1983).

professional codes of conduct.⁷²

3. *Confidentiality of Client Information.*—Opponents of MDPs also argue that nonlawyers in MDPs will gain access to confidential client information if a lawyer either inadvertently or deliberately shares such information with nonlawyers.⁷³

a. *Illustrations.*—One can envision a situation where a nonlawyer, who has learned client confidences in connection with work undertaken for a client, improperly discloses such information to third persons or uses the information for personal gain.⁷⁴ Although concern exists over the potential risks encountered through casual or accidental exposure, the ABA and other MDP opponents have posed an even more drastic situation in which a firm's nonlawyer managers or board of directors "demand access to confidential client information when formulating corporate policy or strategy."⁷⁵

b. *Response.*—Concerns over client confidentiality are encountered in the ABA's current anti-MDP environment. However, two responses should serve to address the issue. First, there exist several provisions within the Model Rules that would protect client confidences in an MDP environment. A lawyer would continue to be bound by the ethical duty to ensure that client information remains confidential.⁷⁶ Model Rule 8.4 prohibits a lawyer from violating the confidentiality rule "through the acts of another."⁷⁷ In addition, Model Rule 5.3 serves to impose upon the lawyer the duty to ensure that nonlawyer assistants comply with the lawyer's professional responsibilities.⁷⁸

In addition to the existing obligations imposed upon lawyers under the current version of the Model Rules, agency law also creates a duty to maintain ethical standards and protect client confidentiality.⁷⁹ A nonlawyer partner, acting

72. See CODES OF PROFESSIONAL RESPONSIBILITY (Rena Gorlin ed. 1990).

73. Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 621 (1994).

74. Andrews, *supra* note 20, at 614.

75. Gilbert & Lempert, *supra* note 54, at 405. The ABA Ethics Committee has struggled with this issue and has commented that "the obligation of the staff lawyers to preserve the confidences and secrets of clients applies to statements to and information conveyed to the [firm's] advisory committee . . . or . . . any other person or body not privy to the lawyer-client relationship." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

76. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

77. The rule states that "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another." MODEL RULES OF PROF'L CONDUCT R. 8.4(a).

78. MODEL RULES OF PROF'L CONDUCT R. 5.3. The comment to Model Rule 5.3 states: "A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product." MODEL RULES OF PROF'L CONDUCT. R. 5.3 cmt.

79. See RESTATEMENT (SECOND) OF AGENCY § 395 (1958) (includes a provision that prohibits agent's use or disclosure of client's confidential information).

as an agent, would owe a client the duty not to disclose information for her own benefit or for the benefit of a third party.⁸⁰ Agency law would be powerful in an MDP environment, for "[t]he lawyer . . . would be legally liable for malpractice if any of the lawyer's partners disclosed confidences to the injury of a client."⁸¹

II. PROBLEMS WITH THE ABA'S ANTI-MDP STANCE

The continued resurgence of attempts to quash the anti-MDP philosophy occurs for good reason. The ABA's prohibition against multidisciplinary practices has created a realm of rigid and unrealistic commercial protectionism that stifles creativity and discourages collaboration among professionals. In addition, consumer demand for non-fragmented legal service increases the need for legal professionals to be able to provide clients with full-service solutions. With the ABA's anti-MDP position in place, the American public suffers.

Three legitimate problems exist surrounding the ABA's stance against MDPs. First, in many cases, state courts and bar associations are either unwilling or unable to enforce the prohibition.⁸² Second, the ABA's anti-MDP position has failed to produce the intended effect of minimizing self-referrals. Third, clients are not afforded the benefits of being able to obtain completely integrated solutions to their legal issues. Further development of each of these issues is warranted. The federal government's restriction against physician investment in ancillary services is illustrative of the failings of the ABA's anti-MDP position.

A. *The Ethics in Patient Referrals Act: A Parallel in Regulation of MDPs*

1. *Background.*—Prior to 1992, no federal legislation forbade a doctor from owning a financial interest in ancillary medical services. However, the federal government became alarmed when it determined that physicians with ownership in such ancillary service companies ordered greater numbers of tests and services than in situations where no ownership interest existed.⁸³ "[S]tudies concluded that physicians had placed their interest ahead of their patients' interest, and ahead of the taxpayers' interest. Medicare officials became alarmed."⁸⁴

Analysis of data collected by the federal government showed that the cost of

80. *See id.* An agent, whether a lawyer or nonlawyer, is "subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent" *Id.* *See e.g.,* *More v. Burroughs*, 205 P. 1029, 1031 (Kan. 1922) (noting that an agent cannot use information acquired by him while acting on behalf of a principal for the agent's own personal advantage).

81. Andrews, *supra* note 20, at 616.

82. *See* Adam Miller, *Professional Schizophrenia*, *MIAMI DAILY BUS. REV.*, Oct. 23, 2001, at 6.

83. KENNETH R. WING, *THE LAW AND AMERICAN HEALTH CARE* 928 (1998). The practice became known more commonly as "self-referral." Morrison, *supra* note 17, at 351.

84. Myers, *supra* note 8, at 547.

unnecessary testing arising from patients being referred to physician-owned ancillary entities ran well into the tens of millions of dollars.⁸⁵ Studies showed that patients of physicians who owned or invested in clinical laboratories received forty-five percent more services than did Medicare patients in general.⁸⁶

To protect patients and federal Medicare dollars, in 1989, Representative Fortney H. Stark introduced the Ethics in Patient Referrals Act, which prohibited any entity or individual from furnishing a service reimbursable under Medicare to an individual if the individual's referring physician or an immediate family member of the referring physician had a financial relationship with the entity.⁸⁷ The Ethics in Patient Referrals Act was enacted into law in 1992 and was codified as Section 1877 to the Social Security Act (42 U.S.C. § 1395nn). The Act became known as "Stark I."⁸⁸

Stark I would not remain unchanged for long. "During the six years it took for Congress to enact and . . . implement Stark I, congressional efforts were already underway to expand the scope of the law."⁸⁹ Congress developed legislation, commonly known as "Stark II," which covers both Medicare and Medicaid and expands the self-referral ban of Stark I from only clinical laboratory services to include ten additional health services.⁹⁰ Stark II took effect January 4, 2002, allowing individuals and entities affected by the final rule time to restructure their business arrangements to comply.⁹¹

2. *Problems with Stark.*—Stark legislation has endured a number of setbacks and has been, in some ways, ineffective in its goals of protecting patients and decreasing Medicare and Medicaid expenditures.

a. *Stark's failure to effectively reduce ancillary services costs.*—Although Stark laws "reduced [the number of physicians who had] ownership in ancillary services,"⁹² it failed to fulfill its actual purpose of reducing the *costs* associated with such services. As one commentator noted, "Medicare officials waited with spreadsheets in hand, prepared to measure the cost savings they had promised . . ." as a result of Stark legislation. Instead, ancillary activity

85. WING, *supra* note 83, at 928.

86. BRADFORD H. GRAY, THE PROFIT MOTIVE AND PATIENT CARE 191 (1991) (further indicating that such laboratory services cost Medicare \$28 million).

87. Jo-Ellyn Sakowitz Klein, *The Stark Laws: Conquering Physician Conflicts of Interest?* 87 GEO. L.J. 499, 499-500 (1998).

88. *Id.* at 500.

89. Maria A. Morrison, *An Analysis of the Stark II Proposed Rule*, 67 U. MO. K.C. L. REV. 613, 614 (1999).

90. The ten additional health services included under Stark II are: (1) physical therapy services; (2) occupational therapy services; (3) radiology services; (4) radiation therapy services and supplies; (5) durable medical equipment and supplies; (6) parenteral and enteral nutrients, equipment, and supplies; (7) prosthetics, orthotics, and prosthetic devices and supplies; (8) home health services; (9) outpatient prescription drugs; and (10) inpatient and outpatient hospital services. 42 U.S.C. § 1395nn(h)(6) (2000)).

91. *Id.*

92. Myers, *supra* note 8, at 548.

increased.⁹³

The void in the market that was created by the restrictions of the Stark legislation was quickly absorbed by institutional organizations such as hospitals, which were not required to comply with Stark.⁹⁴ Hospitals coordinated services to provide organized delivery systems.⁹⁵ The resulting impact was an increase in the volume of clinical and other ancillary services, which logically caused associated Medicare costs to skyrocket.⁹⁶ Accordingly, Stark legislation not only failed to reduce the number of patient referrals for ancillary services, but it also failed in its stated goal of reducing federal government expenditures associated with such ancillary services.

b. Difficulties in the enforcement of Stark.—In addition to an unanticipated increase in ancillary service costs, the federal government has experienced setbacks in applying Stark regulations. Some attempts at enforcing Stark laws have been successful.⁹⁷ However, for the most part, enforcing Stark has proved to be, at best, a challenge. In several instances, Stark “enforcers” have experienced difficulty in defining and identifying inappropriate acts.⁹⁸ Some commentators have noted that complicated exceptions to the rules make spotting infractions cumbersome.⁹⁹ Other scholars have questioned the ethical and economic wisdom of using legislation such as Stark I and II to deal with medical fraud claims.¹⁰⁰

In addition, because potential violators are allowed to avoid the prohibitions against self-referrals by forming indirect ownership arrangements, physicians may still profit from self-referral, while avoiding the stiff civil penalties imposed by the legislation.¹⁰¹ In summary, although difficulty in enforcement is certainly

93. *Id.* (citing LAWRENCE FROLIK & ALISON PATRUCCO BARNES, *ELDERLAW* 470 (1992)). For example, costs associated with one of the excluded services, home health care, more than doubled within the three years after the enactment of Stark. The number of Medicare-funded home health visits increased by eighteen percent annually. *Id.*

94. Myers, *supra* note 8, at 548-49.

95. *Id.* at 548.

96. *See id.*

97. *See* *Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347 (D. Mass. 1999) (qui tam suit involving Stark law violations); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017 (S.D. Tex. 1998) (healthcare provider and affiliates accused of Stark and anti-kickback violations).

98. Morrison, *supra* note 17, at 378 (commenting that “the ambiguity of the language of [Stark laws] is an obstacle to understanding whether a particular arrangement is in violation of the statute”). *See also* GRAY, *supra* note 86, at 200-01 (stating that an overwhelming majority of agencies responsible for monitoring compliance of similar state laws experienced difficulties because of vagueness in the laws).

99. *See* Morrison, *supra* note 17, at 378.

100. *See* Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 76 IND. L.J. 525, 526 (2001).

101. *See* Morgan R. Baumgartner, *Physician Self-Referral and Joint Ventures Prohibitions:*

no reason alone to discard legislation, it has the effect of tipping the scale towards considering more viable options to restrictions on ancillary services and self-referrals.

B. A Comparative Analysis of the ABA's and the Federal Government's Anti-MDP Stance

As discussed in Part I.D. of this Note, the stated purpose of the ABA's stance against MDPs is to preserve the core values of the legal profession by protecting the "lawyer's professional independence of judgment."¹⁰² A less-often asserted, but unquestionably articulated rationale for the prohibition is to eliminate or reduce the lawyer's incentive to become involved in excessive self-referrals.¹⁰³

The ABA's stance against multidisciplinary practices is analogous to the federal government's restriction against physician investment in ancillary services in three ways. First, just as federal courts and administrative agencies have had difficulty enforcing Stark legislation, state courts and bar associations have had problems enforcing their respective prohibitions against MDPs. Second, just as Stark legislation has failed to reduce the number of referrals physicians make for ancillary services, the stance against MDPs has not, and will not, have the effect of reducing referrals between lawyers and nonlawyers. Third, clients and patients in both the legal and medical fields are often not afforded the benefit of being able to obtain completely integrated solutions to their legal or medical issues because attorneys and physicians are forbidden from being wholly involved in resolving the patient's or client's medical or legal issues.

1. *Enforcement Difficulties.*—Like the medical community, the legal profession has also had difficulties enforcing alleged anti-MDP violations. Critics of the ABA's anti-MDP stance comment that "the enforcement model doesn't seem to be going anywhere."¹⁰⁴ For example, in January 2000, Florida attorney, Thomas M. Cryan was accused of violating state bar rules by providing legal services to clients while employed by an accounting firm.¹⁰⁵ Specifically, his accuser, lawyer John Hume claimed that Cryan violated the Florida Bar's rules against practicing law while working for nonlawyers. Hume stated that Cryan was involved in fee splitting when he appeared before the United States Tax Court on behalf of clients and gave legal advice to clients concerning their rights.¹⁰⁶ Cryan responded by stating that the services he provided were not legal

Necessary Shield Against Abusive Practices or Overregulation?, 19 J. CORP. L. 313, 327 (1994).

102. MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt (1983).

103. See Bower, *supra* note 9, at 64. In the medical context, proponents have argued that lack of restrictions against self-referrals erode independent professional judgment, which creates increases in the volume and frequency of unnecessary referrals. Morrison, *supra* note 17, at 371.

104. Miller, *supra* note 82, at 6.

105. *Id.*

106. *Id.*

services, but were instead “professional services.”¹⁰⁷ In April 2001, the Bar’s MDP grievance committee found that without further evidence, there was “no probable cause for further disciplinary proceedings.”¹⁰⁸ As of October 2001, the Florida MDP Grievance Committee, which was formed in February 2000, had investigated no other complaints.¹⁰⁹

Even in situations where it has been substantiated that lawyers violated Model Rule 5.4 or equivalent state bar rules, some courts have upheld the underlying substantive agreement between the lawyer and nonlawyer, thus making the rule essentially ineffective. In *Danzig v. Danzig*,¹¹⁰ a lawyer who had clearly entered into an unethical fee-splitting arrangement with a layperson not only refused to make payment, but also urged the ethical violation as an affirmative defense to the resulting suit by the nonlawyer.¹¹¹ Surprisingly, the court held the contract void and against public policy, but nonetheless enforceable.¹¹²

The difficulty in enforcing Model Rule 5.4 is a double-edged sword. For attorneys who would rather risk suspension or sanctions than pay a hefty fee to nonlawyer partners, it is sometimes an affirmative defense to participating in unethical arrangements. For nonlawyers who partner with lawyers, but may not be aware of the prohibition, the rule undermines the integrity of the profession and allows both lawyers and nonlawyers to make a mockery of the Model Rules. The difficulties (and sometimes, embarrassments) involved in enforcing violations of the anti-MDP rules undermine the benefits afforded by keeping the rule in place. Accordingly, the rules cry out for change.

2. *Problems with the Ancillary Business Justification.*—The ABA’s stance against multidisciplinary practices has an additional goal of reducing the number of unnecessary referrals between lawyers and nonlawyers.¹¹³ The rationale behind the prohibition against self-referrals is as follows: if lawyers and nonlawyers have a financial interest in the outcome of a referral, or a financial arrangement with any entity or partner, or if they receive something of value in exchange for a referral, then they will refer clients who do not need services, or will refer clients to the “highest bidder.”¹¹⁴

107. *Id.*

108. *Id.*

109. *Id.*

110. 904 P.2d 312 (Wash. Ct. App. 1995).

111. *Id.* at 314.

112. *Id.* But see *Trotter v. Nelson*, 684 N.E.2d 1150 (Ind. 1997) (Indiana Supreme Court held that the lawyer may have committed “a gross violation of the Conduct Rules,” and the fee-splitting contract was declared void and unenforceable as against public policy). *Id.* at 1155. Cf. *Florida Bar v. Shapiro*, 413 So. 2d 1184 (Fla. 1982) (lawyer disciplined for paying contingent salary to nonlawyer employee based on amount of fees generated); *Comm. on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Lawler*, 342 N.W.2d 486 (Iowa 1984) (lawyer disciplined for sharing legal fee with nonlawyer assistant in exchange for referral of client).

113. Bower, *supra* note 9, at 64.

114. Cf. *Morrison*, *supra* note 17, at 351 (making identical argument in context of physician

Just as the federal government has seen an increase in ancillary services instead of the decrease it anticipated as a result of the adoption of Stark, the legal profession has seen an increase in the number of ancillary services being performed by accounting firms and other institutional organizations.¹¹⁵ Accounting firms in the United States and worldwide are now “providing more than just traditional accounting services.”¹¹⁶ In 2000, while the ABA and state bar associations debated the pros and cons of whether to allow MDPs, between 5000 and 6000 lawyers in the United States were employed by the five largest accounting firms, performing “quasi-legal” services.¹¹⁷

It is no secret that consumers have become more sophisticated and demanding over time. It is also “axiomatic that consumer dissatisfaction creates new markets.”¹¹⁸ While banks and trust companies affiliate with insurance outlets to become capable of moving clients through coordinated networks, the ABA’s anti-MDP stance generates “dissatisfied consumers and misused professionals.”¹¹⁹ In the legal arena, consumer demand for comprehensive services is driving the proliferation of lawyers and nonlawyers who provide the services to meet those demands—namely in accounting firms. Such responsive measures would hardly fare well as support of an argument for MDPs, except for one important factor: the participants dodge oversight by state courts and bar associations by declaring that they provide “law-related [professional] services,” instead of legal services.¹²⁰

3. *Fragmented Solutions to Legal Issues.*—Consumers of legal services are becoming more and more sophisticated. With the emergence of the internet, packaged legal software, pre-paid legal services, and courtroom television programs, consumers know more about the law than ever before. These well-versed clients require and deserve comprehensive solutions to their legal issues.

With the ABA’s anti-MDP stance in place, clients are often not given access to completely integrated solutions because attorneys are unable to be wholly involved in resolving the client’s legal issues. For example, an elderly client who needed help with pensions, Social Security, Medicare, Medicaid, guardianship, trusts and estates, investments, income, estate and inheritance tax issues, and assisted living would probably be dissatisfied under the ABA’s current rules because the client would have to see an attorney, a social worker, an accountant, and an investment planner individually. The fragmentation that currently exists is often time consuming and costly and works against the consumer’s best interests.¹²¹ “The [consumer] market demands integrated, legal, financial,

self-referral in the medical profession).

115. See Geanne Rosenberg, *Accounting Legal Affiliates Criticize ABA’s Proposal to Restrict MDPs*, NAT’L L.J., July 31, 2000, at B6.

116. Harrison, *supra* note 6, at 902.

117. Nathan Koppel, *What, Me Worry?*, AM. LAW., Sept. 2000, at 23.

118. Myers, *supra* note 8, at 541.

119. *Id.*

120. Miller, *supra* note 82, at 6.

121. Myers, *supra* note 8, at 541.

insurance and support services” for everyone.¹²²

In short, not only is the legal profession being denied the opportunity to engage in endeavors that would be professionally rewarding—and not only are self-referrals between lawyers and nonlawyers increasing—but those who avoid the anti-MDP rules are not held to reasonable standards of legal professionalism.

III. A PRO-MDP ARGUMENT

Currently, there is a broadly recognized need among consumers for innovative, comprehensive solutions to legal issues. Unfortunately, in practically every jurisdiction in the United States, rules prohibiting nonlawyer involvement in the business of law remain on the books.¹²³ MDPs are inevitable, and in fact, exist under the ABA’s current rules. Clients, lawyers and other professions would benefit from a professional model allowing MDPs.

A. *A Survey of Possible Models*

Allowing MDPs would require state bar associations to modify their professional rules to include provisions identifying acceptable conduct. During its consideration of modifying the Model Rules in 1999, the ABA posted on its website five proposed models for the purpose of furthering dialogue on issues that were to be considered by the Commission on Multidisciplinary Practice.¹²⁴ A brief discussion of these models is helpful in developing a workable system that would allow multidisciplinary practices.

1. *The Cooperative Model.*—Under the Cooperative Model, no changes to Model Rule 5.4 would occur.¹²⁵ The prohibitions against fee sharing and partnerships with nonlawyers would continue. Lawyers would be free to employ nonlawyer professionals on their staffs to assist them in advising clients. Lawyers could also work with nonlawyer professionals whom they directly retain or who are retained by the client. Professionals who are completely opposed to MDPs are likely to favor this model because it restricts lawyer/nonlawyer partnerships.

2. *The Command and Control Model.*—The Command and Control Model is based on the amended version of Rule 5.4 adopted in the District of Columbia.¹²⁶ It permits a lawyer to form a partnership with a nonlawyer and to share legal fees subject to certain clearly defined restrictions. For example, the law firm or organization must have “as its sole purpose” the provision of legal services to others.¹²⁷ The nonlawyer must agree to “abide by [the] rules of

122. *Id.* at 553.

123. Andrews, *supra* note 20, at 655.

124. See ABA Comm. on Multidisciplinary Practice, *Hypotheticals and Models*, at <http://www.abanet.org/cpr/multicomhypos.html> (last visited Nov. 4, 2002) [hereinafter *Hypotheticals and Models*].

125. *Id.*

126. *Id.* See also WASHINGTON, D.C. RULES OF PROF’L CONDUCT R. 5.4 (2000).

127. *Hypotheticals and Models*, *supra* note 124.

professional conduct."¹²⁸ In addition, the agreement between the lawyer and nonlawyer must be in writing.¹²⁹

3. *The Ancillary Business Model*.—In this model, a law firm operates an ancillary business that provides professional nonlegal services to clients.¹³⁰ Lawyers and nonlawyer professionals operate as partners in the ancillary business. However, the parties "take great care to assure that [their] clients understand that the ancillary business is distinct from the law firm and does not offer legal services."¹³¹

4. *The Contract Model*.—In the Contract Model, a professional services company and an independent law firm join contractually to provide services to clients.¹³² The law firm remains an independent entity controlled and managed by lawyers, and accepts clients who have a relationship with the professional services company, as well as those who have no such relationship. A typical contract could include the following terms: (1) "the law firm and the professional services firm [agree] to refer clients to each other on a nonexclusive basis"; (2) the law firm agrees "to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising"; or (3) the law firm agrees "to purchase goods and services from the professional services firm."¹³³

5. *The Fully Integrated Model*.—In the full integration model, a single professional services firm is structured with organizational units, one of which provides legal services.¹³⁴ The firm advertises the provision of a "seamless web" of services because the legal services unit may represent clients who either retain its services alone or who retain the services of other units in the firm, in addition to legal services.¹³⁵

B. An Argument in Favor of the Fully Integrated Model

The Fully Integrated Model provides the most comprehensive solution to the problems that exist in an anti-MDP environment. The full integration model would provide consumers and businesses with several advantages, many of which address concerns over enforcement, self-referrals, and fragmented solutions to clients' legal and non-legal needs. Multidisciplinary practices are a responsive solution to the demands of today's sophisticated legal clientele. For three valid reasons, the ABA and state bar associations should adopt rules that will allow the implementation of MDPs.

128. *Id.*

129. *Id.*

130. *Id.*

131. Daly, *supra* note 2, at 225.

132. *Id.*

133. *Id.* at 265.

134. *Id.* at 226. This model differs from the contract model in that there is no free-standing law firm involved. *Hypotheticals and Models*, *supra* note 124.

135. Daly, *supra* note 2, at 226.

1. *Positive Impact on Enforcement.*—The ABA's endorsement of the Fully Integrated Model would result in the "professionalization" of law firm management," which would possibly result in a decrease in the number of violations of the Model Rules.¹³⁶ Professional managers may be better able to determine how quality legal and nonlegal services should be delivered most efficiently and at a lower cost to the consumer.¹³⁷ Such efficiency could lessen incentives for both nonlawyers and lawyers to engage in inappropriate behavior.¹³⁸

The ABA's endorsement of MDPs could also positively impact the ability of state courts and bar associations to enforce rules and ensure that lawyers behave ethically when representing clients within the realm of partnership relationships. Under a pro-MDP model, the ABA and state bar associations would be required to develop enforceable rules under which MDPs could exist. In addition, adding a requirement that arrangements between lawyers and nonlawyers be placed in writing could lessen the possibility of miscommunication between the client and the service professional.

2. *Improvement in the Quality of Self-Referrals.*—While removing or modifying the ABA's anti-MDP stance will not completely eliminate and may not even reduce client referrals, it will help to ensure that client referrals are warranted and will help put measures in place to create incentives for attorneys to behave ethically. The rationale behind the current rule is incorrectly based on the assumption that lawyers and nonlawyers will automatically behave unethically. Although it is true that many individuals are motivated by the almighty dollar, it is improper and unfounded to believe that professionals are motivated to the point that they will intentionally defraud clients. The current increase in self-referrals, most prevalently between the legal and nonlegal professionals, are a result of increasing client demand. Such increase in demand warrants the ABA's response and attention. Instead, the ABA has refused to address the difficult ethical and legal issues that accompany involvement in MDPs and has chosen to ban participation altogether.

The ABA's endorsement of MDPs, along with efforts towards creating workable and effective guidelines for the implementation and operation of multidisciplinary practices will have a positive effect of ensuring that, even as referrals increase, consumers and professionals are protected. Two points

136. Andrews, *supra* note 20, at 628.

137. *Id.*

138. *Id.* Although the ABA concededly has no authority to insist that nonlawyers follow the legal profession's rules, it can address the issue of nonlawyer conduct by specifying the conditions under which a lawyer may work in an MDP. For example, the ABA's Ethics Commission could recommend that a lawyer only be permitted to work in an MDP arrangement if all nonlawyers in the MDP agreed to comply with the lawyers' ethics rules. See American Bar Association, ABA Comm. on Multidisciplinary Practice, Testimony of Laurel S. Terry, Mar. 12, 1999, at <http://www.abanet.org/cpr/terryremarks.html> (last visited Nov. 4, 2002) (recommending that "nonlawyers not be bound by the legal ethics rules *per se*, but [that] they be obliged to comply when necessary to ensure that the lawyer complies").

support this theory. First, sections of the Model Rules adequately ensure that the lawyer acts in the client's best interest. The comment to Model Rule 1.2 (a) states that the "client has ultimate authority to determine the purposes to be served by legal representation"¹³⁹ In addition, Model Rule 1.4 requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹⁴⁰ These rules are broad—much broader, in fact than Model Rule 5.4. Model Rules 1.2 and 1.4 allow state courts and bar associations to use reasonable discernment in determining whether a lawyer has failed to meet her obligations to adequately inform clients of the scope of legal representation.

In addition, in its proposed version of Rule 5.4, the Kutak Commission added a specific measure of protection that would require lawyers to forgo representing any clients where there would be "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."¹⁴¹ This provision, along with an added requirement that attorneys provide clients with full disclosure of any relationship or affiliation with other persons or entities to whom the lawyer was referring the client, would place responsibility on both the lawyer and nonlawyer to ensure that each client has complete information surrounding the handling of his or her legal issues.

3. *Reduced Fragmentation and Increased Comprehensive Solutions.*—MDPs serve the public's interest by reducing fragmentation of legal services and providing consumers with wholly integrated solutions to their legal issues. One-stop shopping is not beneath the legal profession. Often, very business-savvy and sophisticated legal clients wish to use one resource to plan for retirement, provide eldercare for a loved one, or develop a business strategy. MDPs would allow such services and would also reduce costs and increase efficiency.¹⁴²

Under the current system, a client who needs assistance with a problem involving both legal and nonlegal issues must work to coordinate efforts among several firms. The client must also divulge information to both the lawyer and nonlawyer professionals, requiring the investment of considerable time. The concept of multidisciplinary practices recognizes "that the law is increasingly interrelated to many fields that traditionally have been viewed as nonlegal, such as economics, business, engineering, management, medicine, and psychology."¹⁴³ A multidisciplinary practice would allow professionals to collaborate and provide services not only in the area of law, but also in one of the many law related fields. Workable prototypes in the context of elder law and living trusts have already been developed.¹⁴⁴

139. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt (1983).

140. MODEL RULES OF PROF'L CONDUCT R. 1.4 (b).

141. Andrews, *supra* note 20, at 593-94.

142. Morello, *supra* note 2, at 239.

143. Andrews, *supra* note 20, at 623.

144. See Myers, *supra* note 8 (outlining a business plan for "Elder-Comp, L.L.C.," a one-stop firm providing comprehensive and integrated legal, financial, and support services to seniors and caregivers); Pamela Lopata, *Can States Juggle the Unauthorized and Multidisciplinary Practices*

4. *A “Win-Win” Situation for Consumers and Professionals.*—The current ABA rules regarding scope of representation along with an additional provision that requires lawyers to fully disclose their relationship with a nonlawyer to the client will help ensure that (1) consumers are informed of their choices; (2) lawyers accept responsibility for their partnering relationships with nonlawyers; (3) lawyers who are employed by nonlawyer firms, such as accounting or consulting firms, have no incentive to “practice law in secret;” and (4) even as self-referrals between lawyers and nonlawyers increase in response to consumer demand, such relationships will benefit, and not harm, both the consumer and the lawyer professionally.

CONCLUSION

As illustrated by New York’s recent move, state bar associations are not required to adopt the ABA’s Model Rules. So one might ask, “Why then do we need the ABA to endorse MDPs?” One reason is because the tradition and historical perseverance of the ABA represents integrity and the capability to face challenging legal issues head-on. The ABA could be a viable resource to assist states in establishing guidelines for MDPs. Although state bar associations and courts are not required to adhere to the ABA’s opinions and positions on issues such as MDPs, the ABA’s significant influence is evidenced by the fact that four-fifths of states have adopted some version of the ABA’s Model Rules.¹⁴⁵

On February 5, 2002, the ABA House of Delegates debated Report 401 of the Ethics 2000 Commission and amended the Model Rules of Professional Conduct without any reference whatsoever to Model Rule 5.4.¹⁴⁶ However, there remains hope. In May 2002, the Standing Committee on Ethics and Professional Responsibility submitted a report to the ABA House of Delegates recommending that Model Rule 7.2, which addresses advertising, be amended to provide guidance allowing lawyers to participate in referral arrangements with other lawyers and nonlawyer professional services providers.¹⁴⁷ Specifically, Model Rule 7.2 will be amended to add a fourth provision to Rule 7.2(b) that a lawyer may

refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is

of Law?: A Look at the States’ Current Grapple With the Problem in the Context of Living Trusts, 50 CATH. U.L. REV. 467 (2001) (discussing lawyers and nonlawyers working together to market, draft, and sell revocable living trusts, as well as other estate planning instruments).

145. Andrews, *supra* note 20, at 584.

146. See ABA, Summary of House of Delegates Action on Ethics 2000 Commission Report, at http://www.abanet.org/cpr/e2k-summary_2002.html (last visited Nov. 4, 2002).

147. ABA Comm. on Ethics and Prof’l Responsibility, Report to the House of Delegates: Recommendation, at http://www.abanet.org/cpr/ethics-72_75.doc (last visited Nov. 4, 2002).

informed of the existence and nature of the agreement.¹⁴⁸

Under this amendment, referral arrangements are allowed as long as they are non-exclusive, meaning that the lawyer is free to exercise independent professional judgment if, in the lawyer's opinion, referral of a client to a different service provider would be preferable.¹⁴⁹ In addition, the lawyer must disclose the existence of any referral arrangements to their clients before making a referral recommendation.¹⁵⁰ The ABA adopted the amendment in August 2002 and the legal community will undoubtedly wait with anticipation to observe how the changes will impact MDPs.

As one ABA delegate asked, "Why are we in such a hurry to take MDP, lock it up in an airtight container, and put it on the back of the shelf?"¹⁵¹ While some commentators claim that scandals such as the "Enron affair" should be the "death knell of the MDP debate,"¹⁵² in reality, the scandals prove that the ABA's goal should not be to prohibit multidisciplinary practices, but to provide guidance to legal professionals and their associates so that clients are protected.¹⁵³ Instead of expending resources to resist the emergence of MDPs, the legal community and its clients would be better served if the ABA would endorse MDPs and concentrate its efforts on determining the most effective way for attorneys to operate multidisciplinary practices. MDPs make sense for the legal profession and for its consumers.

148. *Id.*

149. *Id.*

150. *Id.*

151. Gibeaut, *supra* note 48, at 93.

152. Robert Lennon, *MDP's Executioners*, AM. LAW., Mar. 2002, at 18.

153. John Caher, *Hassett Ends Term Focused on Multidisciplinary Practice*, N.Y. L.J., June 11, 2001, at 6.

VIRTUAL VIOLENCE OR VIRTUAL APPRENTICESHIP: JUSTIFICATION FOR THE RECOGNITION OF A VIOLENT VIDEO GAME EXCEPTION TO THE SCOPE OF FIRST AMENDMENT RIGHTS OF MINORS

BONNIE B. PHILLIPS*

Despite humble beginnings as a coin-operated, black and white electronic version of ping-pong in a small local bar,¹ the video game has come to offer "some of the most compelling, stimulating, and challenging entertainment available anywhere, in any form."² Second only to the television, video games are the most popular form of entertainment for Americans of all ages.³ The popularity of video games shows little sign of slowing as evidenced by the fact that in 2000 video games comprised approximately thirty percent of the U.S. toy market, reaping more revenue than Hollywood,⁴ and the long lines at the toy store each time a video game manufacturer introduces a new home console or the sequel to a popular game. However, as video game manufacturers reap increasing revenues, there is a growing concern among some parents, teachers, child advocacy groups, and legislators that because of their interactive nature, violent video games pose an even greater risk to the mental, emotional, and physical well-being of children than the extensively documented negative effects of violent television.⁵ Furthermore, the increasingly violent content and the aggressive marketing tactics of violent video games have subjected video game manufacturers to intense criticism by the U.S. Attorney General, members of Congress, and the media. All point to the rise in fatal school shootings where violent video and computer games have been directly implicated in the deaths of school students, citing evidence that the adolescent killers were avid video game players arguably influenced and subconsciously trained by playing violent shooter video games.⁶

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1. Ben Pappas, *From Pong to Kingpin*, FORBES, May 31, 1999, at 54.

2. Paul Keegan, *Culture Quake: What Happens to a Generation Immersed in the Most Violent, Interactive Entertainment Ever Created?*, MOTHER JONES, Nov. 1999, at 42, 44.

3. Mediascope, *Issue Briefs: Video Game Violence* (1999), at <http://www.mediascope.org/pubs/ibriefs/vgv.html> (citing J. Quittner, *Are Video Games Really So Bad?*, TIME, May 10, 1999, 50).

4. Royal Van Horn, *Technology: Violence and Video Games*, 81 PHI DELTA KAPPAN 173 (Oct. 1999) (noting that in 1999 the video game industry earned 8.8 billion dollars, a share larger than the Hollywood box office gross of 5.2 billion dollars.)

5. Elisa Hae-Jung Song & Jane E. Anderson, *How Violent Video Games May Violate Children's Health*, 18 CONTEMP. PEDIATRICS 102 (May 2001).

6. Thom Gillespie, *Violence, Games & Art (Part I)*, 9 TECHNOS: Q. FOR EDUC. & TECH. 17

Video games do not kill people, but new psychological research suggests that violent video games may indirectly lead to death. Specifically, an increasing number of studies support the existence of a positive correlation between exposure to violence in video games and aggressive behavior in children.⁷ Coupled with the rise in school shootings, the statistics revealing the hidden dangers of violence in the media have forced parents and lawmakers to take notice of the content of popular video games. In fact, there is a growing consensus among lawmakers that restricting a child's ability to play violent video games is the most logical starting point in the war to curb juvenile delinquency and violence.⁸ Specifically, lawmakers argue that violent video games should be subjected to age-related restrictions, similar to those placed on tobacco, alcohol, guns, adult movies, and pornography.⁹ However, a recent Seventh Circuit Court of Appeal opinion, addressing a city's ability to restrict a child's access to violent video games in public arcades, suggests that a local government's ability to attack this issue of profound national importance is sharply limited by the Constitution.¹⁰

This Note addresses whether cities and states have a compelling interest in protecting minors from psychological harms posed by violent video game play and, if so, how an ordinance or statute can be narrowly drawn to restrict a minor's access to violent video games in public places without unconstitutionally burdening the First Amendment rights of adults. Part I discusses *American Amusement Machine Ass'n v. Kendrick*, where the Seventh Circuit struck down a first-of-its-kind ordinance restricting a minor's access to violent video games in public places.¹¹ Part II provides a brief survey of the history of video game technology and provide explanations as to the recent emergence of violence in popular video game titles. Part III addresses the scientific studies and psychological research that supports the existence of a compelling interest in protecting the psychological well-being of minors from the harmful effects of violent video games. Part IV discusses the First Amendment constraints upon

(2000) (Doom, the extremely popular ultra-violent video game, has been implicated in the Bethel Alabama; Jonesboro, Arkansas; Littleton, Colorado; and Paducah, Kentucky school shootings as one of the adolescent shooters' favorite video games.)

7. Lisa Mascaro, *Entertainment's Violence, Children's Aggression Linked, Report Says*, L.A. DAILY NEWS, Nov. 6, 2001, at 3A (referring to a report released by the American Academy of Pediatrics that meta-analyzed more than 3500 research studies examining the association between media violence and violent behavior in children, and determined all but eighteen demonstrated a correlation).

8. Wendy Y. Lawton, *Oregon Doctors Group Unites against Violent Video Games*, KNIGHT-RIDDER TRIB. BUS. NEWS, Nov. 6, 2000, 2000 WL 28949158.

9. ABCNEWS.com, *The Games Kids Play: John Stossel Looks at Debate Over Violent Video Games*, at http://abcnews.go.com/onair/2020/2020_000322_videogames_feature.html (Mar. 22, 2000) (quoting from Army psychologist Lt. Col. David Grossman).

10. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

11. *Id.*

creating content-based restrictions in the context of minors and violent video games. Finally, Part V proposes a solution to the narrow tailoring concerns raised by Judge Posner in *American Amusement Machine v. Kendrick*.

I. PLEASE PLAY AGAIN: JUDICIAL REACTION TO THE INDIANAPOLIS ORDINANCE

Indianapolis, Indiana, was the first city in the nation to take legal action to limit a minor's access to violent video games in arcades and other public areas.¹² Adopted on July 10, 2000, Indianapolis City-County General Ordinance, No. 72, section 831-1, placed several restrictions on the accessibility of certain video games to minors. First, the ordinance prohibited arcade operators, regardless of the size of the establishment, from allowing "a minor who is not accompanied by the minor's parent, or guardian, or custodian"¹³ to play any video game that the city considered "harmful to minors."¹⁴ Second, the ordinance required that warning labels, which advised players of the nature of a game's content, be affixed and displayed on every game that included "graphic violence."¹⁵ Finally, arcade owners were required to isolate violent video games from non-violent games by partition, similar to the methods employed by video stores to segregate adult movies from other movies.¹⁶

The ordinance defined the term "harmful to minors" to mean a video arcade game that:

predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and: (1) contains either graphic violence, or strong sexual content.¹⁷

The term "graphic violence" was defined to include a video game's "visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration."¹⁸

Litigation prevented actual enforcement, as the ordinance was stayed pending the judicial resolution of challenges launched by members of the video game industry, who argued that the ordinance was an unconstitutional invasion of the

12. INDIANAPOLIS, IND., CITY-COUNTY GENERAL ORDINANCE, No. 72, § 831-1 (2000).

13. See, e.g., *id.* § 831-5(h) (limiting "registrants" or establishments with five or more games); § 831-6(f) (limiting "exhibitors" or establishments with four or fewer games).

14. *Id.*

15. *Id.* § 831-5(j).

16. *Id.*

17. *Id.* § 831-1.

18. *Id.*

First Amendment rights of minors. After extensive discussion regarding the extent to which video games are protected by the First Amendment and the evidence supporting the city's compelling interest in the welfare of minors, the U.S. District Court for the Southern District of Indiana denied the video game manufacturers' motion for preliminary injunction.¹⁹

Specifically, the district court held that only if the city lacked a "reasonable basis for believing the Ordinance would protect children from harm" would the ordinance be unconstitutional.²⁰ Here, the court reasoned that the psychological studies, offered as evidence by the city, sustained the underlying basis for believing that such measures were necessary to protect children from harm. The studies illustrated that violent video game play engenders aggressive feelings in minors while making them more aggressive in their attitudes and behaviors.²¹ Echoing the concern of violent video game critics, the judge reasoned that,

It would be an odd conception of the First Amendment . . . that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses . . . but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission.²²

However, the aggrieved video game manufacturers inserted another quarter to save the game, by appealing the decision. Then in October 2001, the Seventh Circuit Court of Appeals ultimately struck down the ordinance in a unanimous opinion written by Judge Posner, signifying "game over." The Seventh Circuit Court of Appeals rejected the City of Indianapolis's argument that video games are beyond the scope of First Amendment protection and rejected the contention that a city or state actor may constitutionally restrict minor's access to games depicting graphic violence.²³

The court held that video games are a form of entertainment protected by the First Amendment; therefore, in order for restrictions on video games in public arcades to be valid, such restrictions must withstand strict scrutiny.²⁴ Otherwise stated, the ordinance could only be upheld upon a showing by the City of Indianapolis of two things: first, that the city had a compelling interest in protecting minors from the potential psychological and emotional development of children by shielding them from video games depicting violent content and second, that the ordinance was sufficiently narrowly tailored ordinance that it did not unduly restrict the First Amendment rights of adults.

This decision is significant because it is the first time that a federal court has

19. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000), *rev'd* by 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

20. *Id.* at 962.

21. *Id.* at 962-66.

22. *Id.* at 981.

23. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

24. *Id.*

affirmatively recognized video games as a form of protected speech. However, it is controversial because of the court's refusal to recognize that a city or state has a compelling interest in protecting the well-being of children. Essentially, by requiring the city to provide definitive scientific proof that violent video games caused psychological harm to children, the Seventh Circuit rejected the longstanding "Ginsberg principle," which supports a finding of a compelling interest where government actors have placed content-based access barriers to material that could be deemed harmful to minors, without conclusive proof of psychological harm, provided the barriers' restrictions do not offend the First Amendment rights of adults.²⁵

Here, the court rejected the city's scientific evidence that violent video games endanger a child's physical and psychological health for several reasons. First, the court held that the studies failed to show that video games had even once caused a person to commit a violent act or increased a person's level of violence due to exposure to violent video games. Second, the court pointed to the lack of indisputable evidence that the interactive character of video games made the depictions of violence more dangerous. Third, the court cited the absence of evidence that violent video games posed a greater risk of harm than other forms of violent entertainment.²⁶ Fourth, the court pointed to the prevalence of violence throughout the history of society, reasoning that limiting a minor's exposure to violent video games would have an effect opposite of that desired by the city, holding that "[t]o shield children right up to the age of eighteen from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."²⁷ Finally, the court analogized the city's efforts to the thought control measures employed by the Nazis under the leadership of Adolph Hitler, reasoning that "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."²⁸ However, it is important to note that the court suggested that an amended ordinance could be brought into conformity with the First Amendment if the amendment was more narrowly tailored than the original or if the city was able to demonstrate that "the games used actors and simulated real death and mutilation convincingly, or . . . the games lacked any storyline and were merely animated shooting galleries."²⁹

In the absence of a Supreme Court decision affirmatively resolving the questions of whether video games are a form of entertainment protected by the First Amendment and whether the Ginsberg principle—i.e., the refusal to require

25. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *New York v. Ferber*, 458 U.S. 747 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968).

26. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

27. *Id.* at 577.

28. *Id.*

29. *Id.* at 579-80.

definitive research results to prove harm by a government actor before imposing content-based restrictions on a minor's access to material that could reasonably be deemed to be harmful to them—is still good law; the Seventh Circuit's opinion serves as the only guide for cities and states attempting to protect children by limiting their access to violent media, particularly violent video games. Although Judge Posner offered some direction as to the nature and quantity of evidence demonstrating a correlation between a child's violent behavior and their exposure to video games, the level of proof necessary to establish compelling interest is uncertain. More specifically, Posner's examples of video game content that may lawfully be restricted fail to provide clear guidance as to how to sufficiently narrowly tailor the content proscription. In effect the "uncertainty surrounding the constitutionality of such measures" is deterring governments from addressing the increasingly important implications of a minor's unrestricted access to harmful media in public places.³⁰

II. VIDEO GAMES 101

As video games enter their third decade as one of the most popular forms of entertainment, it is important to have a cursory knowledge of the history of the video game to understand why the judicial victory by the American Amusement Machine Association has set the stage for a "Battle Royale" pitting the government against the games of the Digital Age.³¹

A. From "Pong" to "Grand Theft III": The Evolution of Violent Video Games

Spinning off of the popularity of pinball machines, the first video game, Pong, was successfully introduced in 1972.³² Available only in arcades, this computerized version of table tennis had only black and white graphics and was very easy to play.³³ The success was immediate as evidenced by equipment failure less than a week after the first coin-operated game appeared in the back room of a bar, because the coin drop was flooded with quarters.³⁴ Computerized versions of board games, and professional sports quickly followed as games like Space Invaders and Asteroids became arcade favorites.³⁵ With more than 115,000 units sold, Ms. Pac-Man became the biggest game in arcade history.³⁶

30. Brief for the Appellant at 3, *Am. Amusement Mach. Ass'n v. Kendrick*, 122 S. Ct. 462 (2001).

31. Lawrence G. Walters, Esq., *Video Game Industry Takes Aim at Censorship*, at <http://www.actiontrip.com/columns/videogameindustry.phtml> (last accessed Nov. 11, 2001).

32. Pappas, *supra* note 1.

33. Mediascope, *supra* note 3.

34. Leonard Herman et al., *History of Video Games: The Games Begin 1971-1977*, at http://gamespot.com/gamespot/features/video/hov/p3_01.html (last visited Dec. 3, 2002).

35. Leonard Herman et al., *History of Video Games: The Golden Age: 1978-1981*, at http://gamespot.com/gamespot/features/video/hov/p4_01.html (last visited Dec. 3, 2002).

36. Leonard Herman et al., *History of Video Games: The Great Crash 1982-1984*, at <http://>

In the late 1970s Americans were spending approximately \$200 million annually on video game hardware and software.³⁷

By the early 1980s, Americans were dropping billions of dollars in quarters into arcade games that could be found in nearly every shopping mall, movie theater, bowling alley, roller-skating rink, pizza parlor, grocery store, and bar.³⁸ The proliferation and popularity of arcades led to widespread criticism of video games because of the “deleterious effect upon the quality of life” video game play was having in neighborhoods and cities across America.³⁹ This criticism served as a catalyst for public officials to pursue measures to restrict minors’ access to arcades and in some cases to ban arcades altogether. In an attempt to combat the perceived side effects of arcades (i.e., truancy,⁴⁰ noise,⁴¹ congestion,⁴² and gambling⁴³), cities started regulating video game play through zoning ordinances and licensing procedures.

Despite First Amendment challenges, courts allowed local governments to place various limits on the public’s access arcades, regardless of the age of the player. Defeated, but not destroyed, the video game industry responded to the court sanctioned restrictions on public playing time developing and marketing at home versions of their most popular arcade games. The reasonably priced consoles featured could be played by anyone at anytime, a feature video game players appreciated. By the end of the decade, thirty million homes in the United States had at least one home game platform; in fact, many had the original Nintendo system.⁴⁴

As gaming technology advanced in the 1990s, video game sales soared. Far from the early days when games were only available in black and white at the local arcade, games could now be played at home, in the car, at work, or even on the school bus with the introduction of handheld systems.⁴⁵ Today, “only two percent of video games are played in coin-operated machines in arcade settings”;⁴⁶ however, their presence cannot be ignored because such coin-operated machines are usually the first to employ new gaming technology.⁴⁷

gamespot.com/gamespot/features/video/hov/p5_01html (last visited Dec. 3, 2002).

37. Pappas, *supra* note 1.

38. William Dobreff, *Video Games Wars: Arcades v. City Licensing Laws*, 1983 DET. C. L. REV. 103, 107-08.

39. *America’s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

40. *Rothner v. City of Des Plaines*, 554 F. Supp. 465 (N.D. Ill. 1981).

41. *America’s Best Family Showplace Corp.*, 536 F. Supp. at 174.

42. *Id.*

43. *Aladdin’s Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039 (5th Cir. 1980), *rev’d in part*, 455 U.S. 283 (1982).

44. Pappas, *supra* note 1.

45. Herman et al., *supra* note 34.

46. Fran Spielman, *Proposal Curbs Sale of Explicit Video Games*, CHI. SUN-TIMES, Oct. 31, 2000, at 3.

47. Matthew Hamilton, Comment, *Graphic Violence in Computer and Video Games: Is*

Therefore, as games become increasingly more realistic and violent, such games will be accessible to "all children tall enough to reach the controls" in the local arcade or anywhere stand-alone arcade machines can be found.⁴⁸

"The violence has evolved with the technology from early shooting games blasting mostly spaceships out of the sky to the most gory violence seen today where characters literally tear each other apart with all the realistic details accompanying the act."⁴⁹ Video game content first became an issue in 1993 when the U.S. Senate launched its first "investigation" into video game violence.⁵⁰ The efforts to ban "violent" games ended when the members of the gaming industry agreed to participate in an independent industry-wide rating system.⁵¹ As a result, the Entertainment Software Rating Board (ESRB) was established in 1994 to rate video games and provided information as to the recommended age of players and descriptions of the nature of content.⁵²

Within five years of the creation of ESRB, federal and state lawmakers with the persistent support of child advocacy groups and parents nationwide began to question the increasingly violent content of video games and the effects that playing such games had on children. The concern is justified as evidenced as evidence by the fact that a players' success in forty percent of the top fifty games in 2000 depended upon the player killing someone or ordering the killing of someone.⁵³ Moreover, nine of the fifty most popular games in 2000 fall into the category of first-person shooter games, where the player advances "by killing person after person after person."⁵⁴

In 2001, true to the history of the industry to make games more realistic and lifelike,⁵⁵ *Grand Theft Auto III* (GA3) was released and quickly became one of the most popular video game titles ever. Referred to by critics as a "virtual apprenticeship in crime," GA3 requires players to "run prostitutes, deliver drugs, make gangland hits and generally flout the law."⁵⁶

GA3's violent story line and immense popularity has led many lawmakers and parents to pay more attention to the psychological effect of violent video games. Similarly, industry advocates have shifted their position from arguing for

Legislation the Answer?, 100 DICK. L. REV. 181, 185 (1995).

48. *Id.* at 186.

49. David A. Walsh, *Video Game Violence: What Does the Research Say?*, 1998 VIDEO AND COMPUTER GAME REPORT CARD, at <http://www.mediafamily.org/research/vgrc/1998-2.shtml> (last accessed Jan. 7, 2002).

50. Leonard Herman et al., *History of Video Games: The 32-Bit Era Begins 1993-1997*, at http://gamespot.com/gamespot/features/video/hov/p9_01.html (last visited Dec. 6, 2002).

51. *Id.*

52. *Id.*

53. Gillespie, *supra* note 6.

54. *Id.* at 7.

55. David Clements, *Video Violence Too Close to Real Thing*, STERLING NEWS SERV., July 26, 1995, available at <http://www.media-awareness.ca/eng/med/class/teamedia/vidvionz.htm>.

56. Steven Kent, *Game Glorifies Life of Crime; Hot Release is School for Thugs, Critics Charge*, USA TODAY, Dec. 20, 2001, at D3.

the existence of a right to play video games to the merits of marketing a game where players restore themselves by “jumping into a car with a prostitute . . . [and get] their money back if they run over her afterward or attack her with a baseball bat.”⁵⁷

The popularity of GA3 and its predecessors is troubling when coupled with a recent study that revealed “violence in entertainment and aggressive behavior in children has a closer correlation than secondhand smoke and lung cancer.”⁵⁸ As video games become more integrated into the daily routine of children and the fabric of American entertainment,⁵⁹ critics will increasingly find reasons to challenge the video game industry. In the face of increasing troubling statistics, the controversy surrounding the psychological ramifications of violent video games may very well forever alter the history of the video game.

B. Explanations For the Emergence of Violent Content

Many explanations exist to explain the emergence of lifelike graphic violence content in video games of varying storylines and plots. First, violence is easy. Game designers refer to violence as the “most obvious tool in the game designer’s armamentarium” because a violent games delivers a more “compelling, stimulating, entertaining, intense experience to the player” than a simple puzzle or electronic board game.⁶⁰ Alternatively, critics argue that video game manufactures are more concerned with “competing madly with one another to create the fastest video-game console ever, each boasting more horsepower” allowing for intense sensory experiences as opposed to “spending billions of dollars to create clever story lines.”⁶¹

Second, some game designers admit that it is easier to develop games where violence, as opposed to engaging frameworks of struggle, is the only recourse to overcome obstacles.⁶² Third, game designers suggest that the answer is as simple as basic economics; violent video games “really bring in the quarters for arcades.”⁶³ Fourth, video game designers believe that a video game’s success is dependent upon conflict. Bottom line, without the tension of conflict “games just

57. *Id.*

58. Mascaro, *supra* note 7 (citing a report released by the American Academy of Pediatrics released on Nov. 5, 2001).

59. Ken Lachlan et al., *Popular Video Games: Assessing the Amount and Context of Violence* (paper presented at the annual meeting of the National Communication Association in Seattle, Washington), at <http://web.ics.cc.purdue.edu/~sherryj/videogames/VGCA.pdf> (last visited Dec. 5, 2002) (reporting that adolescents spend an average of forty minutes a day playing video games).

60. Greg Costikyan, *Game’s Don’t Kill People—Do They?*, SALON TECHNOLOGY, June 21, 1999, at http://www.salon.com/tech/feature/1999/06/21/game_violence/index.html.

61. Keegan, *supra* note 2, at 42.

62. Gillespie, *supra* note 6 (quoting Greg Costikyan, a game designer).

63. Jon Konrath, *Video Games and Violence*, at <http://theroc.org/roc-mag/textarch/roc-15/roc15-08.htm> (last visited Nov. 11, 2001).

aren't very fun," and playing video games is supposed to be fun.⁶⁴

Although violence emerged as a prevalent theme in video games very early (in *Space Invaders* and *Asteroids*, for example), it is the recent simultaneous increase in violence, coupled with technology, which allows games to be more realistic, that has caught the attention of parents, psychologists, and legislators. Contemporary video games are accused of conditioning children to do things that are "abhorrent to the human spirit,"⁶⁵ a far different issue than truancy, loitering, or gambling. The interactive nature of video games enables children to direct their realistic on-screen representative to steal automobiles, murder foes, rape women, bomb buildings, and even carry out acts of bio-terrorism.

The concern is not limited to content as two particular technological advances have also come under fire. In 1998, the game developer, Rare, announced that it was adding a "face-mapping" option to one of its top selling games, *Perfect Dark*.⁶⁶ This new technology allows players to "capture anyone's face, and put it into the video game." However, concerns following the Columbine tragedy forced Nintendo to delay installation of the face-mapping feature because students could practice virtually killing their classmates and teachers.⁶⁷

Another advance in gaming technology, Nintendo's Virtual Boy, has generated some concern because of its ability to imitate real-life action and situations. Virtual Boy is "a virtual reality headset which envelopes the player in the video game world."⁶⁸ Currently, Nintendo has only made boxing and other athletic games using this technology available. However, since many video game players think that a sports game is a "waste of time unless it has an extreme aspect to it or a futuristic feel,"⁶⁹ the possibility and popularity of games simulating combat and other first-person perspective shooting has placed the technology under scrutiny.

III. VIOLENT VIDEO GAMES 101: A COURSE IN "KILLOLOGY"

A. *Beginner's Level: Early Research on the Effects of Violent Video Games*

While parents, teachers, physicians, legislators, and video game designers all agree that video games are powerful educational tools, there is little consensus on the effect of violent games.⁷⁰ Moreover, "[t]he empirical literature on the

64. Clements, *supra* note 55.

65. Associated Press, *Ashcroft Urges Parents to Curb Kids' Game Play*, USA TODAY, June 15, 2001, available at <http://www.usatoday.com/life/cyber/tech/review/games/2001-04-04-ashcroft.htm> (last visited Dec. 5, 2002).

66. Jarred, *Censorship of Gaming Violence*, Dec. 16, 2000, at <http://www.nintensity.com/columns/censor.html> (last accessed Feb. 8, 2002).

67. *Id.*

68. Clements, *supra* note 55.

69. Gillespie, *supra* note 6 (quoting an avid teenage video game player).

70. David Moberg, *Policing Virtual Violence in an Anxious New World*, CHI. TRIB., Nov. 15,

effect of exposure to video game violent is sparse.”⁷¹ Due to the relatively recent arrival of ultra-violent video games, there are few studies available on the effects of video game violence.⁷² At a minimum, the research available indicates that regardless of age, players are physically and emotionally affected by playing video games.

Video games have been credited with increasing a child’s hand-eye coordination and sharpening the child’s attention to detail.⁷³ Medical research has linked video game play to noticeable changes in a player’s heart rate and blood pressure.⁷⁴ Further research has linked video game play with a variety of medical concerns. For example, pediatricians in Japan have discovered a correlation between extensive video game play and an increase in persistent “unexplained symptoms.”⁷⁵ Other research has suggested that video game play acts as a catalyst for photosensitive epilepsy by triggering seizures in adolescent players who may have otherwise outgrown their epilepsy.⁷⁶ The aforementioned effects of video games are the results of preliminary research; the long-term effects of video game playing are currently being studied and have yet to be fully uncovered.

Given that early research is only beginning to provide a picture as to what the effects might be on video game players of all ages, the inevitable question becomes whether violent video games have a negative effect on the “most frequent players: children eight to fourteen years and younger.”⁷⁷ It is this absence of extensive research on the effects of video game violence on which video game proponents rely when arguing that the content of video games does not pose a threat of harm to young game players. Critics of violent video games, however, draw attention to the history of television programming research, citing the fact that preliminary evidence in video game research “mirror much of the work done in the area of television violence and its impact on children.”⁷⁸ They reference the more than 1000 studies, where researchers have documented that “children exposed to violent programming are more likely to behave in an aggressive or violent manner and are more likely to become involved with the

2001, 2001 WL 4135897.

71. Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and Life*, 78 J. PERSONALITY & SOC. PSYCH. 772, 772.

72. Walsh, *supra* note 49.

73. Bernard Cesarone, *Video Games and Children*, ERIC DIGEST: ERIC CLEARING HOUSE ON ELEMENTARY AND EARLY CHILDHOOD EDUCATION, Jan. 1994, at http://www.ed.gov/databases/ERIC_Digests/ed365477.html (last accessed Nov. 11, 2001).

74. *Id.*

75. Song & Anderson, *supra* note 5 (referring to the “unexplained symptoms” as headache, abdominal pain, fatigue, nausea, anorexia, weight loss, chest pain, low-grade fever, sweating, exhausted facial appearances, and black rings under the eyes.)

76. *Id.*

77. Walsh, *supra* note 49.

78. *Id.*

justice system than children who have not had such exposure.”⁷⁹ Ironically, “defenders of violent video games use the same argument as defenders of violent television do, claiming that the catharsis these games offer allows players to release aggressive tendencies” discounting the “more than 3500 research studies examining the association between media violence and violent behavior” where “all but eighteen have shown a correlation.”⁸⁰

Despite the similarities between television and video games, there is one striking and significant difference: video games are interactive entertainment. As the following discussion indicates, as results emerge from research on the effect of violent video games, a compelling argument can be made that video games are training their players to kill, like the military trains soldiers for battle.

B. Intermediate Level: Contemporary Research on the Psychological Effect of Violent Video Games on Children

This section provides a cursory survey of two comprehensive studies that examine the psychological effects of violent video games. The first study examined the amount and context of violence in video games popular with children.⁸¹ The second study compiled research on the short-term effects of video game violence.⁸²

In the first study, researchers discovered that “interactive games rated for older children and adults not only feature more violence, but present physical aggression in such a way that increases the risk of learning and emotional desensitization.”⁸³ A review of the sixty most popular games of the year 2000, many of which are rated “T” or “M,” revealed that during a ten-minute period, players were exposed to forty-six violent transactions.⁸⁴ Otherwise stated, while playing the most popular games, individuals witness and virtually commit more than “180 incidents of aggression per day or 5,400 incidents per month.”⁸⁵ Based on general principles of learning, researchers believe that “repeated exposure to acts of aggression in video games may function as a form of cognitive rehearsal that strengthens and reinforces aggressive scripts for social problem solving stored in memory.”⁸⁶ More simply stated, the prevalence of violence in popular video games, especially those rated “T” or “M,” poses a significant risk to younger players because the repeated acts of violence are justified and rewarded. Such games are similar to interactive study guides to violence.

The second study, the General Affective Aggression Model (GAAM), is the most widely cited study of the short-term effects and long-term implications of

79. Song & Anderson, *supra* note 5, at 110.

80. Mascaro, *supra* note 7.

81. Lachlan et al., *supra* note 59.

82. Anderson & Dill, *supra* note 71.

83. Lachlan et al., *supra* note 59.

84. *Id.*

85. *Id.*

86. *Id.*

violent video game play. The GAAM results, published in 2000, were derived from two other studies, one correlational, and the other experimental. The correlational study “measured both the amount of exposure to video game violence and the amount of time participants had played video games in prior time periods regardless of content.”⁸⁷ The subjects were selected from a college student population, “because they are old enough for long-term effects of playing violent video games to have had a measurable impact on real-world aggression.”⁸⁸ Data were collected via self-report questionnaires that focused on exposure to video game violence and the amount of time spent playing video games in general, regardless of content.⁸⁹

The results of the study were two-fold. First, it legitimized the “concern about the deleterious effects of violent video games on delinquent behavior.”⁹⁰ Second, it revealed that time spent playing violent video games was a “superior predictor” of delinquency when compared to time spent playing video games generally.⁹¹

The experimental study “examined the effects of violent video game play on aggressive thought, affect and behavior.”⁹² Each participant attended two laboratory sessions and played the assigned video game a total of three times.⁹³ Researchers found that “inside the laboratory, college students who played a violent video games behaved more aggressively toward an opponent than did students who had played a nonviolent video game.”⁹⁴ Additionally, the research indicated “outside the laboratory, students who reported playing more violent video games over a period of years also engaged in more aggressive behavior in their own lives.”⁹⁵

Together, the two studies add considerable credence to the idea that “exposure to violent video games can increase aggressive behavior.”⁹⁶ The research also indicates that “violent video games provide a forum for learning and practicing aggressive solutions to conflict situations” and that the effect “appears to be cognitive in nature.”⁹⁷ More specifically stated:

In the short term, playing a violent video game appears to affect aggression by priming aggressive thoughts. Longer-term effects are likely to be longer lasting as well, as the player learns and practices new aggression-related scripts that become more and more accessible for use

87. Anderson & Dill, *supra* note 71.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

when real-life conflict situations arise. If repeated exposure to violent video games does indeed lead to the creation and heightened accessibility of a variety of aggressive knowledge structures, thus effectively altering the person's basic personality structure, the consequent changes in everyday social interactions may also lead to consistent increases in aggressive affect.⁹⁸

Together, most importantly, the studies stand for the proposition that, "the active nature of the learning environment of the video game suggests that this medium is potentially more dangerous than the more heavily investigated TV and movie media."⁹⁹

C. Advanced Players Only: Comparative Evidence That Violent Video Games Are Virtual Apprenticeships in Violence

The most compelling source of unsettling evidence that violent video games are conditioning children to commit violent acts can be derived from more than twenty-five years of military research into the psychology of killing conducted by Army Lieutenant Colonel David Grossman, adjunct professor at Arkansas State University and former military psychologist who specialized as a "killologist" for the U.S. military. Grossman offers the "most disconcerting and convincing argument for the hypothesis that violent video games teach violent behavior."¹⁰⁰ His criticism of violent video games stems from his work in the field of killology, "the study of the methods and psychological effects of training army recruits to circumvent their natural inhibitions to killing fellow human beings."¹⁰¹

Developed during World War II, killology was a remedial response to surveys revealing that approximately eighty percent of individual riflemen could not mentally or emotionally bring themselves to fire at an exposed enemy soldier, which from a military perspective is like a "fifteen percent literacy rate among librarians."¹⁰² In the infant stages of killology research, the military learned that "the biggest barrier to killing is the psychological resistance, not the technical skills involved in firing a weapon accurately."¹⁰³ The military employed, and continues to employ, methods of operant and classical conditioning to overcome a human's built-in aversion to killing other humans.¹⁰⁴ The success of killologists, whose missions was to desensitize Marine recruits to increase their effectiveness in combat, was demonstrated during the Vietnam War where the

98. *Id.*

99. *Id.*

100. Song & Anderson, *supra* note 5, at 113.

101. David Grossman & Mary Cagney, *Trained to Kill*, CHRISTIANITY TODAY, Aug. 10, 1998, at 31.

102. *Id.*

103. Walsh, *supra* note 49.

104. Grossman & Cagney, *supra* note 101.

firing rate of individual riflemen averaged better than ninety percent.¹⁰⁵

The military's success at desensitizing soldiers to kill prior to and during the Vietnam War supports the notion that while humans do not naturally kill, they can be trained to kill.¹⁰⁶ Consequently, examining and understanding how the military systematically applied psychological conditioning techniques to eliminate man's inherent resistance to kill in combat is important because the same techniques that are used to train recruits to kill are imitated by game players in popular interactive violent video games.¹⁰⁷ When applied to violent video games, the principles of operant and classical conditioning have a profound impact on impressionable adolescent video game players.

The cornerstone of the military's killer conditioning is operant conditioning, "a very powerful procedure of stimulus-response, stimulus-response," which is employed to teach soldiers to react in a particular way in various situations.¹⁰⁸ One example of how operant conditioning has been used to increase the firing rate on modern battlefields is by the replacement of World War II era bull's-eye targets with realistic, man-shaped silhouettes for target practice that are used by all branches of the armed forces and local law enforcement officers.¹⁰⁹ Research has shown that repeatedly shooting at human silhouettes, as opposed to bull's-eyes, increases the likelihood that "when soldiers are on the battlefield or a police officer is walking a beat and somebody pops up with a gun, they will shoot reflexively and shoot to kill."¹¹⁰ This simple change proves that operant conditioning is effective because statistics show that "seventy-five to eighty percent of shooting on the modern battlefield is the result of this kind of stimulus-response training."¹¹¹

Application of stimulus-response conditioning techniques is not limited to soldiers on the battlefield, but is applied in a multitude of circumstances to persons regardless of age. Generally, research on operant conditioning suggests that when people are frightened or angry, they behave as they have been conditioned to behave.¹¹² Therefore, to increase one's ability to respond to a particular situation, the individual is required to repeat behaviors to learn the desired behavior. Consider school fire drills, an everyday example of the effects of operant conditioning: school fire drills. In fire drills, children learn to file out of the building in an orderly fashion by repeatedly practicing what to do when the fire alarm sounds. Consequently, despite the fact that children are noticeably frightened when there is a real fire, most children do exactly what they have been conditioned to do, escaping the fire and ultimately saving their lives.

Similar to the objective of escaping a burning building quickly in a fire drill,

105. *Id.*; ABCNEWS.com, *supra* note 9.

106. *See* Grossman & Cagney, *supra* note 101; Song & Anderson, *supra* note 5, at 113.

107. *See* Grossman & Cagney, *supra* note 101; Song & Anderson, *supra* note 5, at 113.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

the primary objective of many violent video games is to kill opponents as quickly as possible. Each opponent, like each drill, represents a stimulus; the conditioned response is whatever it takes to eliminate the threat to the player's success like escaping the fire. Additionally, many of the new ultra-violent video games "reinforce violent choices with rewards of additional points, longer playing time, or special effects for certain acts of aggression or violence."¹¹³

Grossman's claim that operant conditioning techniques are employed in video games is supported by medical research. A recent study demonstrated that "striatal dopamine release increases during video game playing and that the correlation between dopamine release and performance level was significant."¹¹⁴ Dopaminergic neurotransmission is linked to "learning, reinforcement behavior, attention, and sensorimotor integration."¹¹⁵ In other words, medical science proves that video games are powerful educational tools, which means that violent video games teach their players that "violence is fun, obligatory, easily justified, and essentially without negative consequences."¹¹⁶ Simply stated, like school children practice escaping a fire, every time a child plays a interactive "point-and-shoot video game, he is learning the exact same conditioned reflex and motor skills" as a police officer training at a firing range.¹¹⁷ While "[i]n the military and law-enforcement worlds, the right option is often not to shoot. But you never, never put your quarter in that video machine with the intention of not shooting."¹¹⁸

The implications of operant conditioning in video games are simple, every time a child plays a violent video game he or she practices destroying his or her enemies. Real life provides an example of presence and effect of operant conditioning in violent video games. Take the school shooting in Paducah, Kentucky, for example. The shooter, a fourteen year old student named Michael Carneal, who had never handled or fired a pistol in his life, "clipped off nine shots in about a 20-second period."¹¹⁹ Eight of the nine shots struck their intended victims, resulting in the deaths of three.¹²⁰ Carneal's expert marksmanship has been attributed to his obsession with video games.¹²¹ Witnesses to the shootings explained that, "He had a blank look on his face. He never moved his feet. He never fired too far to the right or the left or up or down. He simply fired one shot at everything that popped upon on his screen."¹²² Taken together, Carneal and the two Littleton, Colorado, school shooters provide credence to the concern that violent video games are subconsciously teaching its

113. Song & Anderson, *supra* note 5, at 113; *see also* Kent, *supra* note 56.

114. Song & Anderson, *supra* note 5, at 113.

115. *Id.*

116. *Id.* (quoting researchers J.B. Funk and D.D. Buchman).

117. Grossman & Cagney, *supra* note 101.

118. *Id.*

119. Song & Anderson, *supra* note 5, at 113-14.

120. *See id.*

121. *See id.*

122. *Id.*

adolescent players that “the best way to solve a problem is to eliminate the source of the problem.”¹²³

Operant conditioning worked for the military, successfully training army recruits to overcome their inhibitions to kill. These same conditioning techniques can have similar positive consequences when used in educational or strategy games. Alternatively, if you consider the events that may serve as stimuli for children, like teasing by a fellow student or disciplinary action enforced by a parent or teacher, for example, violent video game are subconsciously sending the wrong message to children.

Classical conditioning, unlike operant conditioning that teaches kids to kill, is the “subtle but powerful mechanism” that teaches one to like it.¹²⁴ Classical conditioning techniques originated from Pavlov’s famous work with canines, where the dogs learned to associate the ringing of a bell with food, and after time the dogs could not longer hear the bell without salivating. There are very few examples of the use of classical conditioning in modern United States military training. However, the Japanese have very effectively applied “classical conditioning” methods.¹²⁵ For example:

early in World War II, Chinese prisoners were placed in a ditch on their knees with their hands bound behind them. And one by one, a select few Japanese soldiers would go into the ditch and bayonet “their” prisoner to death. . . . Up on the bank, countless other young soldiers would cheer them on in their violence. Immediately afterwards, the soldiers who had been spectators were treated to sake, the best meal they had had in months, and to so-called comfort girls.¹²⁶

These exercises had the effect of teaching the soldiers “to associate committing violent acts with pleasure,” thus having the ultimate effect of “enabling very large numbers of soldiers to commit atrocities.”¹²⁷

Examples of classical conditioning in violent video games are not as atrocious as the training techniques of the Japanese military, but are equally effective. Most video games, non-violent or violent, reinforce game behavior by awarding players with “additional points, longer playing time, or special effects for certain acts.”¹²⁸ Applying his knowledge of killology to violent video games, Grossman has discovered a “phenomenon that functions much like AIDS,” which he labeled “AVIDS—Acquired Violence Immune Deficiency

123. Media Awareness Network, *Violent Video Games and Stimulus Addiction*, available at <http://www.media-awareness.ca/eng/med/class/teamedia/vidintro.htm> (last accessed Nov. 11, 2001) (adapted from Gloria DeGaetano & Kathleen Bander, *SCREEN SMARTS: A FAMILY GUIDE TO MEDIA LITERACY* (1996)).

124. Grossman & Cagney, *supra* note 101.

125. *Id.*

126. *Id.*

127. *Id.*

128. Song & Anderson, *supra* note 5, at 113.

Syndrome.”¹²⁹ Grossman explains that while AIDS has never killed anybody, “[i]t destroys your immune system, and then other diseases that shouldn’t kill you become fatal.”¹³⁰ Similarly, while violent video games do not kill people, “they destroy your violence immune system and conditio[n] you to derive pleasure from violence. And once you are at close range with another human being, and it’s time for you to pull that trigger, Acquired Violence Immune Deficiency Syndrome can destroy your midbrain resistance.”¹³¹

D. Bonus Round: Non-Scientific Reflections on Violent Video Games

Those who are concerned with the possible negative consequences of the interactive nature of video games because they blur the line that separates fantasy from reality are no longer in the minority. Momentum is growing behind the idea that every time a child plays a violent video game they are subconsciously embracing destruction, violence, and death as a way of life.¹³² Professional educators, who recognize that “[v]ideo games are extremely powerful teaching machines,” are concerned that video games have desensitizing effects even though the technology is “still at a primitive level.”¹³³ Educators are voicing their concern that video gaming technology is “on a trajectory toward increasing realism, or hyperreality, that makes people start thinking they can shoot someone and it doesn’t hurt, that they can recover.”¹³⁴

However, some educators praise the interactive technology and analogize video games to extracurricular activities. Video games allow “geeks get out their competitive spirit . . . because they’re not athletic enough to play on the basketball team.”¹³⁵ They act as an escape valve by giving teens a release, “allowing them to let off steam by doing only virtual damage.”¹³⁶ Finally, some parents argue that children today are over-programmed between school, extracurricular activities, and sports and children live such regulated lives that video games foster a sense of control and independence in children.¹³⁷

Notwithstanding the benefits associated with video game play generally, “social-science work over the last 40 years has shown—that exposure to [media] violence changes our values, makes us more likely to act out aggressively. Not by viewing a particular program, but [after consuming] a steady diet of

129. Grossman & Cagney, *supra* note 101.

130. *Id.*

131. *Id.*

132. See Keegan, *supra* note 2.

133. *Id.* (citing Eugene Provenzo, Professor of Education at the University of Miami and author of a yet to be released book entitled *Children and Hyperreality: The Loss of the Real in Contemporary Childhood and Adolescence*).

134. *Id.*

135. *Id.*

136. Robyn E. Blumner, *Avoid a Panicked Rush to Blame the Media*, ST. PETERSBURG TIMES, Mar. 11, 2001, at D1.

137. See *id.*

violence.”¹³⁸ Heightened concern about the effects of violent video games is justified because the “player is actively involved in constructing the violence.”¹³⁹ The interactive nature coupled by the increasing realism may, in fact, “encourage greater identification with characters and more imitation of the behaviors video game models”¹⁴⁰ and ultimately “increase the likelihood of learning aggressive behavior.”¹⁴¹

Despite the fact that violent video game research is in its embryonic stages, early studies have found a correlation between video game violence and aggressive behavior in children. If further research continues to mirror the extensive body of research available on the negative effects of television violence on children, then it is plausible that violent video games are virtual schools for thugs, providing children with an apprenticeship in violence and delinquent behavior. Further research and time will confirm the concerns that motivated the City of Indianapolis to attempt to restrict minors’ access to violent video games in movie theaters, hotel game-rooms, bowling alleys, and arcades, which will prove with scientific certainty compelling interest in restricting a minor’s access to violent video games.

IV. GAME OVER: RESTRICTING VIDEO GAME PLAY TIME

A. Need More Quarters: The Efforts of Lawmakers to Limit Play Time

Soon after the first coin-operated video game, Pong, was test-marketed in Andy Capps, a local bar in the game designer’s hometown,¹⁴² arguments for limiting or prohibiting access for both adults and children to video games in public places could be heard throughout many communities. Analogizing arcades to bars and brothels, critics argued that video games had the same deleterious effects as alcohol and pornographic magazines, which justified the enactment of ordinances and licensure procedures limiting the time one could spend in a video arcade. Currently, lawmakers are attempting to use similar ordinances to limit a minor’s access to video games in public arcades, not to alleviate perceived social ailments, but to remedy the damaging effect on the minds of children caused by the increasing violent content of many games.

The question of whether government actors may lawfully prohibit or limit minors from engaging in the popular pastime of playing electronic video games has been posed in local and federal courtrooms across the country. Questioning the constitutionality of such restrictions, arcade owners of the video game industry have challenged restrictions limiting and prohibiting playtime on the grounds that video games are speech protected by the First Amendment. However, no clear winner has emerged in three decades of litigation for two

138. Keegan, *supra* note 2.

139. *Id.*

140. Mediascope, *supra* note 3.

141. *Id.*

142. See Herman et al. *supra* note 34.

reasons: the different nature of the restrictions and the various levels of constitutional protection extended to video games by state and federal courts.

Despite the inconsistencies, the U.S. Supreme Court has yet to resolve whether video games are a form of speech protected by the First Amendment, as it has with other forms of entertainment.¹⁴³ This question is an important one as lawmakers in at least three states sponsored bills that would ban violent video games from places where minors congregate: Arkansas,¹⁴⁴ Oklahoma,¹⁴⁵ New Jersey.¹⁴⁶ Additionally, in many cities across the nation, lawmakers in Indianapolis,¹⁴⁷ Chicago,¹⁴⁸ St. Louis,¹⁴⁹ and King County, Washington¹⁵⁰ have taken measures to limit minors' access to violent video games in public arcades and at retail and rental establishments.

B. Playing by the Rules: Implications of the First Amendment

In the absence of a definitive decision by the Supreme Court, similar to the Court's treatment of a state's right to restrict a minor's access to pornography and indecent speech,¹⁵¹ an analysis of the First Amendment is the necessary starting point in determining the government's right to limit a child's access to graphic violence at public arcades. This analysis requires answering three questions. First, the validity of any content-motivated restriction of access to

143. See *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that the Internet deserves the highest level of First Amendment protection).

144. S.B. 81, 83rd Gen. Assem. (Ark. 2001) (prohibiting a minor's access to video games within arcades that were classified as containing adult content) (withdrawn by the author, Senator T. Smith, on Apr. 11, 2001).

145. S.B. 757, 48th Leg. (Okla. 2001) (sponsored by Senator Scott Pruitt and Representative Hopper Smith, banning the sale or rental of any video game with high violence content to anyone under age seventeen) (no formal action was taken on the bill as it was deferred back to committee on Mar. 8, 2001).

146. Assembly Bill 2849, 209th Leg. (N.J. 2000) (sponsored by Assemblyman Leroy J. Jones, Jr., required arcade operators to label and partition those video games containing "harmful graphics" and prohibit minors under age seventeen from playing them without parental consent. The bill died in committee on Nov. 9, 2000).

147. INDIANAPOLIS, IND. CITY-COUNTY GENERAL ORDINANCE No. 72, § 831-1 (2000).

148. Spielman, *supra* note 46, at 3.

149. ST. LOUIS, MO. COUNTY COUNCIL ORDINANCE 20,193 (Oct. 26, 2000) (enacted on October 26, 2000 to regulate the accessibility of minors to violent video games in public arcades in the absence of parental permission. The effective date was pushed back to July 1, 2002 following a legal challenge by the Interactive Digital Software Association that led to an amended version of the sections pertaining to the accessibility to children of video games with violent and sexual content).

150. King County Board of Health, Wa., Resolution 00-302 (Mar. 17, 2000) (requesting the removal of violent video games from public arcades and community centers), *available at* <http://www.metrokc.gov/mkcc/News/0003/03-17Nvvg.htm> (last visited Jan. 10, 2002).

151. *Ginsberg v. New York*, 390 U.S. 630 (1968).

video games is dependent upon whether video games are a form of entertainment within the scope of First Amendment protection. If First Amendment protection extends to video games, the next question is whether violent speech is of a constitutionally protected category. Finally, if violent speech is of a protected category, then the validity of the restrictions depends on whether the content-based regulation survives strict scrutiny.

1. *Are Video Games Within the Scope of First Amendment Protection?*—When video games first became a popular pastime in the early 1980s, ordinances and other government regulations restricting or prohibiting access to public arcades to video game players of all ages were upheld in courtrooms across the country. The majority of courts held that video game restrictions did not implicate First Amendment problems, despite constitutional challenges from arcade owners and video game manufacturers.¹⁵² The theory that video games were beyond the scope of the First Amendment¹⁵³ was premised on the idea that while considered entertainment, video games could only gain protected status if they were “designed to communicate or express some idea or some information,”¹⁵⁴ and video game play was perceived as void any communicative element.¹⁵⁵ In fact, courts analogized video games to pinball machines,¹⁵⁶ reasoning that one’s successful play of a video game was limited to “the player’s eye-hand coordination, reflexes, muscular control, concentration, practice, and on the player’s understanding of the rules of play.”¹⁵⁷ Courts ignored the interactive characteristic of video games, discounting their communicative nature, because communication during game play was “totally divorced from a purpose of expressing ideas, impressions, feelings, or information unrelated to the game itself.”¹⁵⁸ In other words, the fact that “a player may strive to shoot down invaders”¹⁵⁹ was insufficient to implicate First Amendment problems.¹⁶⁰

However, not all courts refused to extend First Amendment protection to video games. A minority of courts held that video games were deserving of First Amendment protection by analogizing their content to that of movies¹⁶¹ and nude

152. *America’s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

153. *Tommy and Tina Inc. v. Dept. of Consumer Affairs of the City of N.Y.*, 459 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1983).

154. *People v. Walker*, 354 N.W.2d 312, 316 (Mich. Ct. App. 1984).

155. See *America’s Best Family Showplace Corp.*, 536 F. Supp. at 174.

156. See *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 610 (Mass. 1983).

157. *Caswell v. Licensing Comm’n for Brockton*, 444 N.E.2d 922, 926 (Mass. 1983).

158. *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1444 (D.R.I. 1985).

159. *Caswell*, 444 N.E.2d at 926.

160. See *American’s Best Family Showplace Inc.*, 536 F. Supp. at 174.

161. See *Stern Electronics, Inc. v. Kaufman*, 523 F. Supp. 635, 639 (E.D.N.Y. 1981) (the trial judge described the video game *Scramble*, as a “movie in which the viewer participates in the action”).

dancing.¹⁶² Furthermore, many of the courts that refused to extend protection to primitive video games did not foreclose the possibility. Several justices acknowledged in dicta that if video games of the future were to incorporate “more sophisticated presentations involving storyline and plot that convey to the user of a significant artistic message” or were of the nature that they could be “considered works of art,” such games would require First Amendment protection.¹⁶³

Despite the substantial advances in video game popularity and technology in the 1990s, courts avoided the issue of whether video games were deserving of Amendment protection.¹⁶⁴ Only recently have courts willingly analyzed free speech in the context of video games. In *American Amusement Machine Ass’n v. Kendrick*,¹⁶⁵ both the district and appellate court justices held that “at least some video games are protected by the First Amendment,”¹⁶⁶ echoing the wisdom of those courts that two decades before hypothesized about the realities of video gaming technology and more sophisticated games.

Although the U.S. Supreme Court has yet to definitively address the First Amendment in the context of video games, the recent lower court decisions categorizing video games as protected speech are cogent with the expansion trend evident in First Amendment jurisprudence. The Supreme Court has extended First Amendment protection to include various forms of entertainment similar to video games, such as movies,¹⁶⁷ radio and television broadcasts,¹⁶⁸ nude dancing,¹⁶⁹ and, more recently, the Internet.¹⁷⁰ As a result, the Supreme Court is likely to include video games within the scope of constitutionally protected speech and question the constitutional validity of government regulations restricting the access to and availability of video games, regardless of the game player’s age.

2. *Is Violent Speech Protected?*—Assuming that video games are within the scope of the First Amendment, the next question becomes whether constitutional protection extends to the graphic content of video games. Otherwise stated, does

162. See *Gameways, Inc. v. McGuire*, NYLJ (N.Y. Sup. Ct. 1982) (reasoning that since viewing nude dancing through a coin operated machine was judicially recognized as constitutionally protected, and nude dancing was no more informative than video games, that video games were a form of speech protected by the First Amendment).

163. *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991).

164. See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991); *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990).

165. 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev’d*, 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001) (the lower court’s extension of constitutional protection to video games was not challenged on appeal).

166. *Id.* at 954.

167. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

168. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

169. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (acknowledging that nude dancing is expressive conduct within the outer perimeters of the First Amendment).

170. *Reno v. ACLU*, 521 U.S. 844 (1997).

the First Amendment protect violent speech? Generally, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."¹⁷¹ However, the Supreme Court has never interpreted the First Amendment as providing full and absolute protection to all forms of speech and expression.¹⁷² Historically, the Supreme Court has confined the categories of unprotected speech to defamation,¹⁷³ fighting words,¹⁷⁴ direct incitement of lawless action,¹⁷⁵ and obscenity.¹⁷⁶ The Supreme Court has expanded these narrow categories of speech only recently to include child pornography.¹⁷⁷

Currently, depictions of violence and violent speech are not included among the narrow categories of unprotected speech carved out of the First Amendment protection. Furthermore, courts have expressly declined to expand the definition of obscenity to include graphic depictions of violence¹⁷⁸ because "[v]iolence and obscenity are distinct categories of objectionable depiction."¹⁷⁹ The distinction between obscenity and violent speech has been articulated in reference to video games. In *American Amusement Machine Ass'n v. Kendrick*, Judge Posner refused to create an exception to the narrow categories of unprotected speech that would include graphic violence on the opinion that "the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity . . . neither compels nor forecloses a like exclusion of violent imagery."¹⁸⁰ Consequently, the First Amendment protects graphic depictions of violence, violent images, and violent speech; therefore, any attempts to regulate such speech are subject to strict scrutiny.

3. *Constitutional Standard of Review*.—Generally, regulation of speech is either content-neutral or content-based in nature. A restriction is content-neutral if it serves to "restrict the flow of ideas and information consequent to the pursuit

171. U.S. CONST. amend. I.

172. David C. Kiernan, Note, *Shall the Sins of the Son Be Visited Upon the Father? Video Game Manufacturer Liability For Violent Video Games*, 52 HASTINGS L.J. 207, 210 (2000).

173. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

174. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

175. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

176. *Miller v. California*, 413 U.S. 15, 37 (1973) (reaffirming that obscene material is not protected by the First Amendment); *Chaplinsky*, 315 U.S. at 572.

177. *New York v. Ferber*, 458 U.S. 747 (1982).

178. See *Winters v. New York*, 333 U.S. 507, 518-20 (1948); *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev'd by*, 244 F.3d 572, 574 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66-67 (2d Cir. 1997); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992).

179. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574 (citing *Winters*, 333 U.S. at 518-20; *United States v. Thoma*, 726 F.2d 1191, 2000 (7th Cir. 1984) (stating that "depictions of torture and deformation are not inherently sexual and, absent some expert guidance as to how such violence appeals to the prurient interest of a deviant group, there is no basis on which a trier of fact could deem such material obscene"); *State v. Johnson*, 343 So. 2d 705, 709-10 (La. 1977).

180. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574.

of a distinct governmental goal.”¹⁸¹ Content-neutral restrictions, often referred to as time, place, and manner restrictions, are “motivated by state interests unrelated to speech and expression, but ha[ve] the effect of infringing on the free exercise of First Amendment rights.”¹⁸² For example, noise ordinances designed to control noise on public streets or in residential neighborhoods are content-neutral regulations.¹⁸³ Alternatively, a restriction is content-based if it focuses directly on the ideas, subject matter, or content of the speech.¹⁸⁴ Video game ordinances that restrict or prohibit a minor’s access to particular arcade games because of their violent content are a contemporary example of content-based restrictions.

As a general rule, content-based restrictions on speech are presumptively invalid and subjected to the highest level of judicial review, strict scrutiny.¹⁸⁵ Applying strict scrutiny, under the First Amendment Speech Clause, the government may only “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”¹⁸⁶ However, in upholding broad restrictions on a child’s access to pornography¹⁸⁷ and indecent speech,¹⁸⁸ the Supreme Court has demonstrated that while minors have constitutional rights in common with adults, those “rights are not coextensive with the rights of adults.”¹⁸⁹ Consequently, in many situations where the legislative efforts are aimed at safeguarding children, the Supreme Court has imposed a more relaxed standard of scrutiny when evaluating the compelling government interest promoted by the challenged age-related speech proscription.

The underlying rationale for the double standard present in First Amendment juvenile jurisprudence is sometimes referred to as the “harm-to-minors” censorship principle,¹⁹⁰ where subjecting the rights of minors to greater circumscription than the rights of adults is justified because the “unique developmental and emotional characteristics of childhood give rise to special state interests.”¹⁹¹ The ‘harm-to-minors’ principle originates from two landmark

181. *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1453 (1985).

182. *Id.*

183. *See Kovacs v. Cooper*, 336 U.S. 77 (1949).

184. *Allendale Leasing, Inc.*, 614 F. Supp. 1440, 1453 (1985).

185. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

186. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

187. *Ginsberg v. New York*, 390 U.S. 629, 642 (1968).

188. *Sable Communications*, 492 U.S. at 131 (recognizing a compelling state interest in preventing minors from being exposed to indecent telephone messages, but concluding that the statute was not a narrowly tailored effort to serve that compelling interest).

189. Note, *Assessing the Scope of Minors’ Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1167-1168 (1984) [hereinafter Note, *Assessing the Scope*].

190. Marjorie Heins, *Not in Front of the Children: “Indecency,” Censorship, and the Innocence of Youth*, 10 B.U. PUB. INT. L.J. 360 (2001) (book review).

191. Note, *Assessing the Scope*, *supra* note 189, at 1163.

Supreme Court decisions, *Prince v. Commonwealth of Massachusetts*¹⁹² and *Ginsberg v. New York*.¹⁹³ In *Prince*, the Court upheld the conviction of the aunt/custodian of a nine-year-old girl for violating the Massachusetts Child Labor Law by permitting the child to sell religious literature on the streets of Boston.¹⁹⁴ *Prince* represents the first case where the Court expressly recognized that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults” even where fundamental rights are invaded.¹⁹⁵

A quarter of a century later in *Ginsberg*, the Supreme Court again recognized the importance of protecting the welfare of children and seeing “that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens.’”¹⁹⁶ In *Ginsberg*, the Court upheld a criminal obscenity statute that prohibited the sale to minors of material defined to be obscene on the basis of its appeal to them regardless whether or not it would be obscene to adults. The *Ginsberg* decision recognized that a state’s constitutional power to regulate the well-being of its children in order to aid those with the primary responsibility for children is in addition to a state’s independent interest in the well-being of its youth.¹⁹⁷

Despite criticism, the Supreme Court has continued to recognize the harm-to-minors principle articulated in *Ginsberg*. Advocates of a First Amendment that is applied without regard to age agree that free speech protection is necessary to prepare “youth to become active participants in a democratic society” and foster critical analytical skills.¹⁹⁸ Other critics of the harm-to-minors principle argue that the restrictions are the equivalent of “intellectual protectionism” serving only to inhibit children’s ability to “cope with their environments and the stimuli that surrounds them,” ultimately causing greater harm than that posed by the speech from which minors are being shielded.¹⁹⁹ Nevertheless, the Court has demonstrated that it is committed to the idea that a state has a “compelling interest in protecting the physical and psychological well-being of minors.”²⁰⁰

For more than a century, the Supreme Court has recognized that “the unique developmental and emotional characteristics of childhood give rise to special state interests that in some cases may justify restricting children’s rights more severely than the rights of adults.”²⁰¹ The tension between a state’s interest in the well-being of its children and the rights of children “reflects conflicting and unclear visions of the role that the government should play in the lives of its

192. 321 U.S. 158 (1944).

193. 390 U.S. at 642.

194. *Prince*, 321 U.S. at 170.

195. *Id.*

196. 390 U.S. at 640, 641 (quoting *Prince*, 321 U.S. at 165).

197. *Id.* at 639-40.

198. Heins, *supra* note 190.

199. *Id.*

200. *Id.*

201. Note, *Assessing the Scope*, *supra* note 189, at 1163.

minor citizens.”²⁰² Absent a bright-line rule, it is impossible to predict with certainty how the Supreme Court will decide any case involving the rights of minors, but, at a minimum, *Ginsberg* is still good law today, and in the face of mounting evidence of the negative effects of violent video games, the Supreme Court is likely to find that a city or state has a compelling interest in protecting its minors from the psychological harms posed by violent video games.

V. VIRTUAL APPRENTICES NEED PUBLIC AND PRIVATE GUIDANCE COUNSELORS

In *American Amusement Machine Ass’n*, Judge Posner struck down the Indianapolis Ordinance restricting a minor’s access to video games that the city characterized by the city as having content “harmful to minors.” At the conclusion of the decision, Judge Posner provided advice to future lawmakers. He instructed that if and when the research studies prove with reasonable certainty that video games with mature or adult content pose risks to the psychological well-being of minors, ordinances restricting a minor’s access to violent video games in public arcades must be narrowly tailored so as to leave adult access and playtime unobstructed. In light of the nature and quantity of evidence linking children’s violent behavior and their exposure to video games now available, restrictions can and should be placed on a minor’s ability to play violent video games in public places, provided that the statute is narrowly drafted. The current self-imposed rating system, implemented to warn parents as to the content of video games, can be used by city and state lawmakers to determine which games should not be accessible for play by minors under the age of seventeen in public places.

A. *Separating the Good from the Bad*

Since its establishment in 1994, the Entertainment Software Rating Board (ESRB) has become the nation’s leading non-profit entertainment software rating body.²⁰³ ESRB is responsible for maintaining an unbiased, standardized rating system. The success of this voluntary rating system is attributable to the unprecedented support of the video game industry, child advocacy groups, national retailers, and federal lawmakers.²⁰⁴ From 1994 to 2001, more than 352 video game publishers voluntarily submitted titles to the ESRB for rating, resulting in content ratings for at least 9011 video games.²⁰⁵

The rating process is simple. Three raters review the content of each game frame by frame, independently submitting recommendations as to the appropriate

202. *Id.*

203. ESRB, *About ESRB: Frequently Asked Questions*, at <http://www.esrb.com/faq.asp> (last visited Feb. 8, 2002) [hereinafter ESRB, *FAQ*].

204. *Id.*

205. ESRB, *About ESRB: Announcements*, at <http://www.esrb.com/> (last visited Feb. 8, 2002).

category and content descriptors.²⁰⁶ The ESRB staff makes the final determination as to the rating and content descriptions that are placed on the games packaging.²⁰⁷

Each game is categorized into one of five symbolic ratings, either: EC, E, T, M, or A. "EC" stands for "Early Childhood," meaning that its content is suitable for persons aged three and older and absent any material that parents would find inappropriate. "E" stands for "Everyone," meaning that its content is suitable for persons aged six and older; however, it may contain minimal violence, some comic relief, and some crude language. "T" stands for "Teen," meaning that its content is suitable for persons ages thirteen and older but may contain violence, mild or strong language, or suggestive themes. "M" stands for "Mature" meaning that its content is suitable for persons ages seventeen and older because it may contain more intense violence or language and include depictions of mature sexual themes. "A" stands for "Adults Only" meaning that its content is suitable for adults only because it may include graphic depictions of sex and/or violence.²⁰⁸

The ESRB rating system was designed to inform parents "what age group the game is appropriate for."²⁰⁹ However, it can serve a similar function for lawmakers, providing a guide as to what video games are most likely to threaten the psychological well-being of adolescent players. By only restricting access to those games determined by the ESRB as having "mature" or "adult only" contents, the discretion of lawmakers is severely limited. By leaving the responsibility of categorizing a video game's content to a well-respected, independent rating board, lawmakers are merely serving the same role a parent plays when purchasing or renting video games from a store. A city ordinance or state law that prohibits minors under the age of seventeen from playing video games containing violent and sexual themes is analogous to a parent refusing to buy similar games for their children. Currently, a parent's prohibition on violent game play is only effective in the home, because children can play games (that they are not allowed to buy from a store unless accompanied by a parent) at the local arcade, movie-theater, hotel game room, or roller skating rink without parental permission or adult supervision.

B. Evidence That a Minor's Access Can Be Restricted Without Unduly Interfering with Adult Game Time

Evidence that such a minor's access to video games can be restricted without impending adult access to violent games can be found in any one of the twenty arcades owned and operated by GameWorks, a joint venture of Universal

206. ESRB, *FAQ*, *supra* note 203.

207. *Id.*

208. ESRB, *ESRB Video & Computer Game Ratings: About Ratings & Descriptors*, at http://www.esrb.com/esrb_about.asp (last visited Feb. 8, 2002).

209. ESRB, *FAQ*, *supra* note 203.

Studios, Sega Enterprises, and DreamWorks SKG.²¹⁰ Following recommendations made in the Federal Trade Commission's report on the effects of mature video games on children, GameWorks voluntarily adopted a policy that restricts the access of children under the age of sixteen to video games designated to have particularly violent content unless a special pass is purchased by a parent or guardian.²¹¹ "Instead of using the traditional coins or tokens, [guests] buy debit-type cards that can be used at any of the 200 games or attractions."²¹² GameWorks offers two types of cards: one for unlimited access and another, the "V-Card," that allows only limited access. "If under the age of 16 and unaccompanied by a parent or adult guardian, only the limited access 'V-Card' is sold to the guest. By employing the use of a special card-scanning device, or 'V-Card,' minors are denied access to games identified as containing mature content."²¹³

Pursuant to ratings recommendations developed by the ESRB, GameWorks has designated certain games as having mature content.²¹⁴ Those games that are considered as having a mature content are "flagged with a large red sticker."²¹⁵ Consequently, "when a limited access 'V-Card' is swiped on a restricted game, the display will read 'NO PLAY' and the game will not activate."²¹⁶ Moreover, adult access to the fifteen percent²¹⁷ of games deemed to have mature content is unimpeded and the First Amendment right to free speech is protected.

Advocates of restricting a minor's access to violent video games point to the ease and success of the self-imposed child-friendly Gameworks approach. Although movie theaters, roller skating rinks, hotel game rooms, and arcades may experience a decline in the revenue associated with popular violent video games, they could implement a policy similar to that of Gameworks, albeit less elaborate, without serious financial loss or interfering with the constitutional rights of their adult patrons. Together, the ESRB rating board and the policy implemented by Gameworks illustrate two important points. First, despite the fact that most children play video games, not all video games were intended for children. Second, with little difficulty, operators of arcades could limit a child's access to those video games that are not meant for child's play. In light of the fierce defense launched by the American Amusement Machine Association attacking the Indianapolis Ordinance in federal court, video game manufacturers and arcade owners are unwilling to prohibit their adolescent patrons from plugging millions of dollars of quarters into their most popular video games,

210. *LA Arcade Restricts Violent Games*, USA TODAY, Oct. 6, 2000, available at <http://www.usatoday.com/life/cyber/tech/review/games/cgg240.htm>.

211. *Id.*

212. *Id.*

213. GameWorks, *About Gameworks* at http://www.gameworks.com/scoop/pr_gameplay_policy.html (last visited Nov. 11, 2001).

214. *Id.*

215. *LA Arcade Restricts Violent Games*, *supra* note 210.

216. GameWorks, *supra* note 213.

217. *Id.*

regardless of the short and long-term implications on their psychological well-being. Therefore, city and state lawmakers have a responsibility to heed the ESRB warnings that accompany violent video games and prohibit their play by children in public places.

CONCLUSION

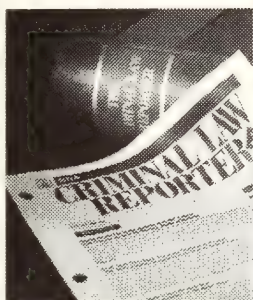
While it is true that most children who play violent video games do not turn into school shooters or commit murders, the studies show a correlation suggesting that “every one of those millions possibly has, sleeping inside them, an expert assassin.”²¹⁸ This Note discusses an issue that is quickly becoming a controversial topic as “young people gain greater access to weapons and show less reluctance about using them”²¹⁹ and the influence of violent video games is increasingly coming under scrutiny. While the responsibility of children falls primarily on the parent, cities and states have a duty to support the role of a parent, rather than act as the grandparent who spoils the child. In the context of video games found in arcades, hotel game rooms, movie theaters, and roller skating rinks, cities have a responsibility to ensure that minors are denied access to those games that the video game industry has independently deemed as having mature content. Denying a city the ability to limit a child’s access to adult video games is equivalent to allowing a child to purchase cigarettes and adult magazines from vending machines or allowing underage drinkers to consume alcohol in public places irrespective of their parent’s wishes. As school shootings and the incidents of violent juvenile delinquency increase, the debate over the effects of violent video games and other violent entertainment will encourage more city and state lawmakers to pursue courses of action that will take violent video games out of the hands of minors. This Note attempts to provide a constitutional solution to this problem that is easily applied and provides a logical starting point for remedying the effects of violent video games.

218. Vote.com, *Video Games Teach Kids That Life Is Cheap*, at <http://www.vote.com/vote/1733953/argument1735434.phtml?cat=6834323> (last visited Feb. 8, 2002).

219. Joan Vennoch, *When Teenagers Turn Violent*, BOSTON GLOBE, Mar. 27, 2001, at A13.







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